EDITOR'S NOTE

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87-5259

No.

IN THE

SUPREME COURT OF UNITED STATES

October Term, 1986

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Amendment fair cross-section requirement prohibits the prosecution's racially discriminatory use of the peremptory challenge.

Whether Batson should be applied retroactively to all convictions not final at the time certiorari was denied in McCray v. New York in order to correct the inequity and confusion resulting from the intentional postponement of the re-examination of Swain.

Whether a defendant overcomes the presumption of correctness of the prosecution's proper use of its peremptory challenges, as recognized by Swain v. Alabama, where examination of the prosecutor's volunteered reasons for its exercise of its challenges to exclude black jurors demonstrates that the prosecution has engaged in racial discrimination.

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Respondents.

INTRODUCTION

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it Please the Court:

Petitioner, Frank Dean Teague, respectfully prays that this Court issue a writ of certiorari to review the en banc decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The original panel opinion reversed the district court's denial of habeas corpus relief. That panel decision is unreported but is attached to this Petition as Appendix A. The panel opinion was vacated and the cause was set for rehearing en banc pursuant to Circuit Court Rule 16(e). That order is reported at 779 F.2d 1332 (7th Cir. 1985) and is attached as Appendix B. On May 11, 1987, the en banc Court of Appeals affirmed the decision of the district court denying habeas corpus relief, Cudahy and Cummings, JJ., dissenting. That opinion is reported at 820 F.2d 832 (7th Cir. 1987) and is attached as Appendix C. The district court order granting summary judgment in favor of Respondents is unreported and attached as Appendix D.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28

U.S.C. 1254(1). This Petition is being filed within 90 days of the decision of the Court of Appeals, which issued on May 11, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Frank Teague, a black man, was convicted of the offense of armed robbery of an A & P supermarket and attempt murder of police officers who were shot at following the robbery. His defense was insanity which he contended was caused in part by his wrongful incarceration in a federal penitentiary for almost eight years. The jurors who were selected and sworn to decide the issue of his guilt or innocence were white, the prosecution having elected to exercise all ten of the peremptory challenges afforded it by statute, Ill.Rev.Stat., Ch. 38, Sec. 115-4(e), to excuse prospective jurors who were black. Defense counsel also excused a prospective black juror because she was married to a

police officer and his client was charged with attempt murder of police officers. (R. 97)

When objection was made during jury selection to the prosecution's use of its peremptory challenges to exclude blacks from the jury, the prosecutor represented that he was attempting to achieve a balance of men and women and age groups, noting also defense counsel's use of a single peremptory to excuse a prospective black juror and that the prosecution had also excused a white juror who was a prospective alternate. (R. 97, 98, 177, 178) The trial judge made no finding with respect to the validity of the State's reasons for exercise of its challenges, but the record refutes the contention that blacks were eliminated from the jury in an effort to achieve sexual and age balance. See Appendix A, panel opinion, pp. 24-27.

Although not disputing that the prosecution had utilized its peremptory challenges solely for the purpose of excluding a racial group from the jury, the Illinois Appellate Court concluded that Teague was not entitled to any relief from his conviction because he had made no showing of systematic exclusion of the group as required by Swain v. Alabama, 380 U.S. 202 (1965). The Court declined to follow People v. Wheeler, 22 Cal. 3d 258, 584 P.2d 748 (1978) on the basis that the remedy it proposed was vague and uncertain and would alter the nature of the peremptory challenge. The Court concluded that abolition of the peremptory challenge by the legislature would be the appropriate means to end the prosecution's practice of using its challenges to exclude a racial group. People v. Teague, 108 Ill.App.3d 891, 439 N.E.2d 1066 (1st Dist. 1982)(Campbell, J. dissenting). The Illinois Appellate Court denied a Petition for Rehearing and the Illinois Supreme Court denied leave to appeal. People v. Teague, 449 N.E.2d 820 (Ill. 1983)(Simon,J. dissenting). This Court denied a Petition for Writ of Certiorari. Teague v. Illinois, 464 U.S. 867 (1983)(Marshall and Brennan, JJ., dissenting).

On March 5, 1984, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois, complaining that his Sixth and Fourteenth Amendment rights were violated when the prosecution

utilized its peremptory challenges to exclude black jurors. In his Brief submitted in support of the Petition, Teague asked the district court to accept the invitation of this Court in McCray v. New York, 461 U.S. 961 (1983) to re-examine the issue of whether the Constitution prohibits the use of peremptory challenges to exclude a racial group from the jury and to conclude that an accused is denied his right to a jury drawn from a fair cross section of the community when the prosecutor employs peremptory challenges to exclude jurors on the basis of race. (Petitioner's Brief, p. 16) Petitioner also cited in support of his argument McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y.1983), which held that the Equal Protection Clause, either alone or in in conjunction with the Sixth Amendment, prohibits the racially discriminatory use of the peremptory challenge. (Petitioner's Brief. p. 15) Respondents moved for summary judgment, contending Swain v. Alabama, 380 U.S. 202 (1965) controlled. (Memorandum in Support of Respondents' Motion for Summary Judgment) Petitioner cross-moved for summary judgment and cited in support thereof Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983), wherein the Court held that if a prosecutor volunteers explanations for his challenges, those explanations may be reviewed to determine whether there has been a perversion of the peremptory challenge contrary to Swain. (Memorandum In Support of Cross-Motion, p. 6) The district court on August 8, 1984 granted summary judgment in favor of Respondents, concluding that although it found Petitioner's arguments persuasive and might be inclined to adopt his reasoning if the court were writing on a clean slate, the issue was foreclosed by Swain and Seventh Circuit decisions declining to depart from Swain. (Order p. 2)

In the Court of Appeals, Petitioner again urged that Swain be re-examined and a procedure such as that outlined by the Courts in McCray v. Abrams or Weathersby v. Morris be adopted whereby an accused could complain of the prosecutor's racially discriminatory use of peremptory challenges in a single case. (Appellant's Brief, pp. 15, 25) A divided panel concluded that the Sixth Amendment does bar the racially discriminatory use of peremptory challenges so as to deprive an accused of the fair

possibility of obtaining a representative jury, but that opinion was vacated and the case set for rehearing en banc pursuant to Circuit Rule 16(e). U.S. ex rel. Teague v. Lane, 779 F.2d 1332 (7th Cir.1985).

Following the decision of this Court in Batson v. Kentucky, 106 S.Ct. 1712 (1986), the parties were directed by the Court of Appeals to file additional memoranda discussing the impact of Batson on this case. Petitioner argued that his Sixth Amendment claim remined viable (Memorandum of Appellant, pp. 3-7) and that even if it would be determined that Batson would not be given full retroactive effect, Batson should apply to all cases, including Petitioner's, not yet final at the time certiorari was denied in McCray v. New York, 461 U.S. 961 (1983). (Memorandum of Appellant, pp. 14-18) In response to Respondents' argument, made for the first time in its post-Batson memorandum, that Petitioner had waived any equal protection claim by a procedural default in the state court (Memorandum of Respondents, pp. 2-6), Petitioner argued there had been no procedural default, whether or not the equal protection claim had been raised in state court, because that claim had been rejected on its merits by the state court, which had denied Petitioner relief on the grounds that Swain controlled. Petitioner cited Ulster County Court v. Allen, 442 U.S. 140 (1979), United States ex rel. Ross v. Franzen, 688 F.2d 1181 (7th Cir. 1982) and Thomas v. Blackburn, 623 F.2d 383 (5th Cir. 1980) as support for this argument. (Responsive Memorandum, pp. 3-4) Following en banc reargument, the Court of Appeals determined that Allen v. Hardy, 106 S.Ct. 2878 (1986) foreclosed retroactive application of Batson to Petitioner, Teague v. Lane, 820 F.2d 832, 834 and n.4 (1987), that Petitioner had not made a showing of an equal protection violation pursuant to Swain, even assuming that claim was not procedurally barred by Wainwright v. Sykes, 433 U.S. 72 (1977), 829 F.2d at 834 n.6, and that the Sixth Amendment fair cross-section requirement was inapplicable to the petit jury.

REASONS FOR ALLOWANCE OF WRIT

WHETHER THE SIXTH AMENDMENT FAIR CROSS-SECTION REQUIREMENT

EXTENDS TO THE PETIT JURY SO AS TO BAR THE RACIALLY DISCRIMINATORY USE OF THE PEREMPTORY CHALLENGE IS A RECURRING QUESTION ON WHICH THIS COURT EXPRESSED NO VIEW IN BATSON BUT WHICH REMAINS CONTROVERSIAL, RESULTING IN CONFLICTING DECISIONS FROM BOTH STATE AND FEDERAL COURTS, THUS MERITING THIS COURT'S REVIEW.

Petitioner was tried by an all white jury as a consequence of the prosecution's use of all ten of its peremptory challenges to exclude black jurors. Petitioner contends the prosecution's racially discriminatory use of its challenges violated his Sixth Amendment right to be tried by a jury drawn from a fair cross section of the community. Petitioner does not complain that the jury that was chosen in his case did not mirror the community or insist that he is entitled to a jury of any particular composition, but contends that the fair cross-section requirement prohibits the prosecution's use of peremptory challenges in a racially discriminatory manner to unreasonably restrict the possibility the jury is comprised of a fair cross section of the community. This issue was expressly left undecided by this Court in Batson v. Kentucky, 106 S.Ct. 1712, 1716 n.4 (1986), and considerable conflict exists among the circuit courts of appeals and other courts regarding whether the prosecution's racially discriminatory use of the peremptory challenge violates the Sixth Amendment. Therefore, it is appropriate that this Court grant certiorari.

Both the Second and Sixth Circuit Courts of Appeals have adopted the view that the Sixth Amendment fair cross-section requirement extends to the petit jury so as to bar the prosecution's use of the peremptory challenge on the basis of race. Roman v. Abrams, 41 CrL 2245 (2nd Cir. 6/9/87); Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated, 106 S.Ct. 3289, aff'd on reconsideration, 801 F.2d 871 (1986), cert. denied, 107 S.Ct. 910. The split among the circuit courts of appeals and various state courts on this issue was noted in United States ex rel. Yates v. Hardiman, 656 F.Supp. 1006, 1012 (N.D.Ill. 1987), which court concluded that the fair cross-section requirement is violated where jurors are peremptorily challenged by the

prosecution because they are the same race as the defendant. See also Fields v. People, 732 P.2d 1145 (Colo. 1987)(claim of racially discriminary use of peremptory challenges subject to Sixth Amendment analysis).

The Seventh Circuit Court of Appeals rejected Petitioner's argument on the grounds that the fair cross-section requirement has no applicability to the petit jury, only to the venire from which the petit jury is drawn. Teague, 820 F.2d at 839. While Lockhart v. McCree, 106 S.Ct. 1758 (1986) has been interpreted as supporting that position, the question was left unresolved in Lockhart since this Court determined Witherspoon-excludables were not a distinctive group in the community for Sixth Amendment purposes. 106 S.Ct. at 1765. That this Court vacated and remanded McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984) and Booker v. Jabe, 775 F.2d 762 (1985) in light of Allen v. Hardy, 106 S.Ct. 2878 (1986) and Batson v. Kentucky, 106 S.Ct 1712 (1986), and not in light of Lockhart, has also been held indicative of an absence of intent that Lockhart settles the Sixth Amendment issue. Yates, 656 F.Supp. at 1015.

Prior decisions of this Court provide a basis to conclude that the fair cross-section requirement extends beyond the jury venire. In Apodaca v. Oregon, 406 U.S. 404, 413 (1972), this Court expressed the view that the fair cross-section requirement forbids "systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels." (Emphasis added) Louisiana's special exemption for women was held to violate the Sixth and Fourteenth Amendments in Taylor v. Louisiana, 419 U.S. 522, 538 (1975) not merely because women were thereby excluded from the jury pool but because it "operate[d] to exclude them from petit juries." Trial by jury of less than six person was held to violate the Sixth Amendment in Ballew v. Georgia, 435 U.S. 223, 237 (1978) because it deceases the opportunity for meaningful and appropriate representation of a cross section of the community on the petit jury, not on the panel or venire from which the jury is drawn.

Permitting the prosecution to exercise its peremptory challenges to excuse perspective jurors on the basis of race

alone similarly violates the fair cross-section requirement because it presents no less an obstacle to the possibility of minority representation on the jury. Selection of a jury drawn from a fair cross section of the community is not an end in itself, but contemplates the possibility that the petit jury will be similarly comprised. The fair cross-section requirement would be illusory if no restriction existed on the ability of the prosecution to interpose an obstacle to minority representation on the petit jury so long as minorities were not excluded from the venire.

The controversy over the continued vitality of the Sixth Amendment analysis to the peremptory challenge issue persists. A direct conflict exists among the circuit courts of appeals regarding whether the fair cross-section requirement can have any applicability to the petit jury. This Court declined to adopt any view on this issue in Batson but the continued divergence of opinions demands that this Court grant certiorari to finally resolve the dispute.

BATSON SHOULD BE APPLIED RETOACTIVELY TO ALL CONVICTIONS NOT FINAL AT THE TIME CERTIORARI WAS DENIED IN McCRAY v. NEW YORK IN ORDER TO CORRECT THE INEQUITY AND CONFUSION WHICH RESULTED WHEN THIS COURT, WHILE SIGNALING THAT SWAIN WAS NO LONGER DISPOSITIVE, INTENTIONALLY DELAYED A DECISION ON THE ISSUE RESOLVED BY BATSON.

In Griffith v. Kentucky, 107 S.Ct. 708 (1987), this Court extended the benefits of Batson v. Kentucky, 106 S.Ct. 1712 (1986) to all cases pending on direct review or not yet final at the time the decision in Batson was reached. In a concurring opinion, Justice Powell expressed his agreement with the views of Justice Harlan respecting rules of retroactivity as stated in Mackey v. United States, 401 U.S. 667, 675 (1971)(Harlan, J. concurring and dissenting) and Desist v. United States, 394 U.S. 244, 256 (1969)(Harlan, J. dissenting), and his hope that, when squarely presented with the question, the Harlan view that habeas petitions should generally be judged according to the constitutional standards existing at the time of the conviction, would be

adopted by the Court. Griffith, 107 S.Ct. at 716 (Powell, J., concurring). Petitioner submits that this case squarely presentes the issue of the retroactivity of decisions to habeas petitions and asks that a rule of retroactivity be adopted to extend the benefits of Batson to those habeas corpus petitioners, including Petitioner herein, whose cases were not yet final at the time this Court denied certiorari in McCray v. New York, 461 U.S. 961 (1983).

In Harlan's view, generally, the law prevailing at the time a conviction became final is to be applied in adjudicating habeas petitions. The justification for extending the scope of habeas to all alleged constitutional errors being to force trial and appellate courts in the federal and state system to toe the constitutional mark, it is unnecessary to apply new constitutional rules on habeas to serve that interest. Mackey, 401 U.S. at 688.

At the time Petitioner's conviction became final,[1] the state of the law respecting a prosecutor's discriminatory use of peremptory challenges was uncertain. When certiorari was denied in McCray v. New York, 461 U.S. 961 (1983), Justices Brennan and Marshall dissented, while Justices Stevens, Powell and Blackman joined in an opinion stating they recognized the importance of the issue presented, but believed further consideration of the problem by other courts would enable the Court to address the problem more wisely at a later date and asked that the various states serve as laboratories in which the issue would receive further study before it was finally addressed. This concurrence, coupled with the dissent, signaled that the state courts were no longer bound by Swain v. Alabama, 380 U.S. 202 (1965). At the same time the Court intentionally delayed resolution of the issue on the assumption that lower courts would accept the Court's invitation to re-examine the issue on its merits, an assumption which proved to be untrue in Illinois which continued to hold the issue foreclosed by Swain.

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[1]Certiorari was denied in McCray on May 31, 1983. Petitioner's conviction became final when certiorari was denied on October 3, 1983.

Just as Justice Harlan found it indefensible for the Court to "[fish] one case from the stream of appellate review, [use] it as a vehicle for pronouncing new constitutional standards, and then [permit] a stream of similar cases to flow by unaffected by that new rule," Mackey, 401 U.S. at 679 (Harlan, J., dissenting), it is indefensible to fish one case from the stream of appellate review, signal that a change is forthcoming, yet leave it entirely to the discretion of lower courts whether to follow precedent that was at that point questioned or discredited, though not expressly overruled. In intentionally delaying a decision, this Court increased the possibility that different constitutional protection would be meted out to defendants simultaneously subjected to identical constitutional deprivation, which is inconsistent with the goal of treating similarly situated defendants similarly. United States v. Johnson, 457 U.S. 537, 556 (1982). Moreover, since the opinion of Justice Stevens respecting the denial of certiorari in McCray made it difficult if not impossible for lower courts to discern what was the prevailing state of the law since they were cast in the role of laboratories where the law was open to experimentation, lower courts were unable to determine after McCray if they were "toeing the constitutional mark." Solem v.Stumes, 465 U.S. 638, 653 (1983). The failure of this Court to provide firm guidance to the lower courts from the time of denial of certiorari in McCray until Batson compels the conclusion that if Batson is to be given limited retroactive effect, it should be measured from the date of denial of certiorari in McCray and be held applicable to all cases then pending on direct review.[2] The inequity and confusion which resulted from the Supreme Court's intentional postponement of resolution of the issue of the vitality of Swain can only be corrected by extension of the benfits of Batson to all those thus affected.

[2] This holding would be consistent with this Court's resolution of Allen v. Hardy, 106 S.Ct. 2878 (1986) inasmuch as Allen's conviction was final when certiorari was denied in McCray.

THE DIRECT CONFLICT BETWEEN THE DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS AND THE SEVENTH CIRCUIT COURT OF APPEALS REGARDING WHETHER AN EQUAL PROTECTION VIOLATION MAY BE PROVEN PURSUANT TO SWAIN v. ALABAMA OTHER THAN BY PROOF OF A SYSTEMATIC EXCLUSION OF BLACK JURORS BY PEREMPTORY CHALLENGE IN CASE AFTER CASE, A QUESTION LEFT OPEN BY SWAIN, SHOULD BE RESOLVED BY THIS COURT.

Even should this Court decline to hold Batson v. Kentucky, 106 S.Ct. 1712 (1986) has any retrospective application to his case, Petitioner contends that he is entitled to relief from his conviction because the record establishes an equal protection violation pursuant to Swain v. Alabama, 380 U.S. 202 (1965). In Swain, this Court reaffirmed that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Proctection Clause." 380 U.S. at 204. However, after reviewing the purpose and function of the peremptory challenge system, it concluded that a presumption must exist in any particular case that the prosecution is using its challenges to obtain a fair and impartial jury to try the case before the court, and that this presumption would not be overcome by allegations that all the Negroes had been removed or that they were removed because they were Negroes. 380 U.S. at 222. The Court did agree that the presumption of proper use might be overcome if a prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes with the result that none ever serve on petit juries. 380 U.S. at 223, 224. Swain did not limit a defendant's demonstration of a perversion of the peremptory challenge amounting to an equal protection violation to proof of such circumstances, but merely acknowledged such proof would overcome the presumption of proper use. The question remains, therefore, as to what other circumstances might demonstrate purposeful discrimination by a prosecutor in his use of his challenges.

Petitioner contends that where a prosecutor volunteers his

reasons for exercising his peremptory challenges, the prosecutor is no longer cloaked with the presumption of correctness, but opens up the issue and the court may review his motives to determine whether the purposes of the peremptory challenge are being perverted. The court must then be satisfied that the challenges are being exercised for permissible trial-related considerations, and that the proffered reasons are genuine ones and not merely a pretext for discrimination. The Ninth and Eighth Circuit Courts of Appeals have both held that a defendant may establish a violation of the equal protection principles of Swain by such a method. Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987). The Seventh Circuit Court of Appeals in Petitioner's case refuses "to read Swain so broadly," and insists that absent evidence that establishes a pattern of systematic exclusion of blacks larger than the single case there is no basis for an equal protection challenge even if it could be demonstrated that the prosecution exercised its peremptories on the basis of race. Teague, 820 F.2d at 834 n.6. This interpretation of Swain is questionable in light of the fact that the Batson Court attributed the requirement of proof of repeated striking over a number of cases to lower courts, 106 S.Ct. at 1720, and Justice White, author of the Swain opinion, noted in his Batson concurrence that it would not be "inconsistent with Swain for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant." Batson 106 S.Ct at 1725 n.* (White, J., concurring). Certiorari jurisdiction should therefore be exercised by this Court to resolve the direct conflict which exists among the circuit courts of appeals regarding whether an equal protection violation may be found, consistent with Swain, in circumstances other than where a systematic pattern of exclusion occurs over a large number of cases, a question which is not resolved by Swain or Batson.

Although the Seventh Circuit opinion in this case states

that no Swain claim was raised in state court and therefore it is procedurally barred pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), this circumstance does not make it inappropriate for this Court to grant certiorari. Not only did the State waive this argument by failing to raise this objection when Weathersby was cited and argued by Petitioner in the district court and court of appeals, but the court of appeals reached this argument on its merits. Cf Granberry v. Greer, 95 L.Ed.2d 119 (1987). Moreover, since Petitioner was denied relief in the state court on the ground that a Swain equal protection analysis controlled the result, Teague, 439 N.E. at 1070, thus rejecting any equal protection claim on its merits, there has been no procedural default which bars the federal courts from addressing this issue. Ulster County Court v. Allen, 442 U.S. 140 (1979).

CONCLUSION

Wherefore, Petitioner, Frank Dean Teague, prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 84-2474

UNITED STATES OF AMERICA, ex rel. FRANK TEAGUE,
Petitioner-Appellant,

v.

MICHAEL P. LANE, Director, Department of Corrections and
MICHAEL O'LEARY, Warden, Stateville Correctional Center,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 84 C 1934 -- William T. Hart, Judge.

ARGUED APRIL 9, 1985 -- DECIDED

Before CUDAHY and COFFEY, Circuit Judges, and PECK, Senior Circuit Judge.*

CUDAHY, Circuit Judge. The question we must decide is whether the Constitution prohibits prosecutors from excluding potential jurors solely on the basis of race.

I.

Frank Teague was tried before a jury in an Illinois court and convicted of attempted murder and armed robbery. At the time of Teague's trial, each side had ten peremptory challenges

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* The Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

in a case of this sort, 38 Ill. Rev. Stat. § 115-4, and the state exercised all ten of its challenges to exclude black jurors. The defense also challenged one black, and there were no blacks on the resulting jury.

The defense moved for a mistrial twice, after the prosecution had used six peremptory challenges to exclude six blacks and again at the conclusion of selection proceedings; it argued that the state was denying Teague his right to a trial by a jury of his peers by excluding prospective jurors on the basis of race. These motions were denied. A prosecutor need not defend his peremptory challenges, as things now stand. Nevertheless, the state in this case offered reasons for the choices that were made: it said that it was attempting to obtain a balance of men and women and that numerous individuals who were excused were of "very young years."

The Illinois Appellate Court took note of the state's rationale for its actions, but also noted that "the record shows that white jurors who fell within the [gender] and age groups to which the State referred were not excused peremptorily by the State." 439 N.E.2d 1066, 1069-70 (Ill. App. 1982). It held, however, that under existing law no restriction could be placed on a prosecutor's exercise of peremptory challenges in an isolated case. 439 N.E.2d at 1071.

II.

The precise issue raised here is whether it is a violation of a defendant's sixth amendment rights for a prosecutor to use

his peremptory challenges for the purpose of excluding the members of a given race from the petit jury. We must assume, as given, that such a use is not a violation of the equal protection clause of the fourteenth amendment. Swain v. Alabama, 380 U.S. 202 (1965).

The sixth amendment question was raised, but not decided, in two recent cases in this circuit. In United States v. Clark, 737 F.2d 679 (7th Cir. 1984), we held that that the facts of the case failed to raise a presumption of racial motivation:

> But we need not decide in this case whether it is ever permissible to challenge, as racially motivated, the exercise (not pursuant to a systematic policy of racial exclusion) of a peremptory challenge; for Kunkel's lawyer failed to establish a sufficient likelihood of racial motivation to warrant the judge's holding a hearing on the question.

737 F.2d at 682. And in United States ex rel. Palmer v. DeRobertis, 738 F.2d 168 (7th Cir.), cert. denied, 105 S. Ct. 306 (1984), a habeas proceeding, we upheld the holding of the district court that the petitioner had waived the objection by failing to raise it in state court. 738 F.2d at 171.[1] In

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[1] In Palmer, the state appellate court declined to consider the issue not because it had not been raised below--which it had not--but on the ground that there was no record:

> Defendant next contends that the State improperly exercised its peremptory challenges to exclude members of his race from the jury. By agreement of the parties, no report of proceedings was had of jury selection. As a result, defendant's argument cannot be considered.

People v. Palmer, No. 80-1132, Slip Op. at 3-4 (First Judicial District, August 5, 1981).

both cases there was some consideration of the merits, but in neither case was consideration essential to the outcome. We believe that the time for deciding the issue has arrived.

A. Equal Protection.

In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court held that it is not a denial of equal protection of the laws, under the fourteenth amendment, for a prosecutor to exercise his peremptory challenges on racial grounds, so long as such exclusion of a race from petit juries is not done in such a way as to prevent members of the race from ever serving on juries. The Court held that a prima facie case of discrimination could be established by showing that blacks had been systematically struck from trial juries; but it went on to say what would be required for such a prima facie showing, and in doing so set a standard difficult to meet: "If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome." 380 U.S. 224. But the policy must work to exclude every black in a venue, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be." 380 U.S. 223. Swain himself had established "by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama." 380 U.S. at 231-32

(Goldberg, J., dissenting). But since he had not established that every black excluded was excluded by the state, he did not succeed in raising an inference of systematic exclusion. See United States v. Childress, 715 F.2d 1313, 1316-17 (8th Cir. 1983), cert. denied, 104 S. Ct. 744 (1984).

The Swain case was clearly decided on equal protection grounds. Although the Court did not question the standing of the defendant Swain, the rights being asserted and the rights addressed by the Court were in large measure the rights of blacks not to be excluded from jury service. Swain's motions had claimed discrimination "against members of the Negro race in order to prevent them from serving on juries," and making it "impossible for qualified members of the Negro race to serve as jurors in this cause or any cause."[2] The Court responded that the equal protection clause did not apply unless there was

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[2] The issue was raised at trial in the Swain case in two different motions. The motion to quash the venire said in part:

> 4. Defendant avers the existence of a system or practice . . . deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries . . . .

And the motion to declare void the petit jury selected said, in part:

> (3) That because of the systematic and arbitrary method of selecting the names of qualified male citizens . . . it is impossible for qualified members of the negro race to serve as jurors in this cause or any cause . . . .

Swain, 380 U.S. at 210-11 n.6.

a system and practice of exclusion; but that where a system and practice can be shown, proof of that

> might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not intended to facilitate or justify.

380 U.S. at 224. But the right of blacks to serve on juries--a right violated, according to Swain, only when a pattern or practice of exclusion is shown--is quite distinct from the right of the defendant to a fair trial. And thus the question to what extent the defendant's right to a fair trial includes the right to have members of a given race on his jury would seem to be utterly distinct from the question answered in Swain.

B. Sixth Amendment Right to an Impartial Jury.

The fourteenth amendment guarantees not only equal protection but also due process; at the time Swain was decided, however, it was not clear precisely what jury-trial rights were guaranteed by the amendment's due process clause. It has since been held, in Duncan v. Louisiana, 391 U.S. 145 (1968), that the sixth amendment applies to the states through the fourteenth amendment; but it has not yet been resolved whether the sixth amendment right to a jury of one's peers includes the right not to have eligible jurors excluded from one's trial jury on the basis of race. Thus the question we must answer is really independent of Swain; for granted that there is no equal protection argument against such a use of peremptory

challenges, the question remains whether such an argument can be based on the due process clause and the sixth amendment.

In McCray v. New York, 103 S. Ct. 2438 (1983), the Supreme Court was given the opportunity to decide the question, but declined to grant certiorari. Justice Marshall, with whom Justice Brennan joined, dissented from the denial, arguing that Swain ought to be reconsidered in light of Taylor and other recent sixth amendment cases:

> [In Taylor v. Louisiana,] we accepted the "fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment," 419 U.S. at 530 . . . . [But the] right to a jury drawn from a fair cross-section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury.

103 S. Ct. at 2442 (Marshall, J., dissenting from denial of certiorari). Significantly, three other justices explained that although they voted to deny certiorari, they agreed with Justice Marshall about the importance of the issue, but believed that eventual consideration by the Court would benefit by submitting the issue first to other courts. 103 S. Ct. at 2438 (Stevens, J., joined by Justices Blackmun and Powell).[3]

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[3] The Court has now granted certiorari in the case of Batson v. Kentucky, 105 S. Ct. 2111 (1985), an unpublished opinion in which the Kentucky Supreme Court rejected the defendant's sixth amendment claim in one short paragraph:

> Appellant next contends that it was error to permit the prosecuting attorney to exercise preemptory challenges to all of the blacks who were called as jurors in this case. Appellant acknowledged that the United States

(footnote continued on next page)

Thus the Court has, by five votes, effectively urged the lower courts to consider the issue that we grapple with today. The Second Circuit, in later proceedings in the McCray case itself, reached the issue. In light of the opinions accompanying the denial of certiorari, McCray had taken his case to the federal district court for a writ of habeas corpus, and the district court had ruled that the sixth amendment required judicial scrutiny of discriminatory prosecutorial challenges.[4] Relying in part on developments in the state courts in California and Massachusetts, the district court laid out a format for litigating allegations of an abuse of peremptory challenges.

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3 Continued
Supreme Court in Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that preemptory challenges against blacks, by themselves, do not violate the Fourteenth Amendment equal-protection clause. However, appellant urges this court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that preemptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood that the challenges were based solely on group membership. People v. Wheeler, 583 P.2d 748 (Cal. 1978), and Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979). We have recently reaffirmed our reliance upon Swain in Commonwealth v. McFerron, Ky., ___ S.W.2d ___ (1984), holding that an allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule.

Batson v. Commonwealth, No. 84-SC-733-MR, slip op. at 4-5 (Kentucky, December 20, 1984).

4/ The district court also held that Swain was no longer good law, but that holding was not essential to the decision, and it was rejected by the Second Circuit.

> If the prosecution's peremptories have been used in such a way as to establish a prima facie case of racial discrimination, the presumption of proper use of the peremptory gives way and the burden shifts to the prosecution to justify its challenges on nonracial grounds. . . . [A] prima facie case of improper challenges may be established when the venire-persons excluded are members of a 'cognizable group, discrimination against which is prohibited,' and the probable reason for their exclusion is their membership in the group rather than any predisposition regarding the specific case at bar . . . . Once this showing is made, the prosecution may rebut the prima facie case by demonstrating that its peremptory challenges were motivated by perceived case-specific biases, rather than by group association.

McCray v. Abrams, 750 F.2d 1113, 1117 (2d Cir. 1984) (paraphrasing the district court opinion, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983)). Because the state court had not followed the format and inquired into discrimination, the district court ordered a new trial.

The Court of Appeals agreed that McCray had made a prima facie showing of discrimination, but reversed the grant of the writ, sending the matter back to the district court for a hearing into the state's rebuttal. 750 F.2d at 1134-35.

III.

A body of reasoning has developed which supports the Second Circuit's conclusion that the sixth amendment prohibits prosecutors from using the peremptory challenge to exclude prospective jurors on the basis of race. Because of the importance of the issue, and because there is a split in the circuits on the matter,[5] we think a careful review of the

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5 Compare Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983) ("we . . . reject [the] contention that the

(Footnote continued on next page)

argument is in order.

As we see it, the problem arises in the first place out of the clash between two devices, both intended to secure the impartiality of the jury, and neither of which we would like to see destroyed: the peremptory challenge and the requirement of representativeness in the jury pool. For the most part they do not conflict; but where they do, as in the present case, one or the other must give way. And where one or the other must give way, the choice will depend on the policies underlying each device--taking into consideration that one is constitutionally guaranteed but the other is not--and the degree to which favoring one will require the abandonment of the other.

A. The Requirement of a Representative Jury Pool.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme

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5 Continued
prosecutor's use of peremptory challenges to exclude black persons from [defendant's] petit jury violated his sixth amendment rights") and United States v. Childress, 715 F.2d 1313, 1318 (8th Cir. 1983) ("After careful consideration of [the question], we must reluctantly conclude that there is no sixth amendment exception to the equal protection analysis in Swain.") with McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).

In addition, the Sixth Circuit, in a unanimous panel opinion, recently aligned itself with the Second Circuit's approach in McCray v. Abrams. The Sixth Circuit ruled that a prosecutor or defense counsel may not systematically exercise his peremptory challenges to discriminate racially. Booker v. Jabe, No. 83-1136 (6th Cir. October 29, 1985). We believe the Sixth Circuit standard is substantially identical to our own and that a "systematic exercise" would necessarily occur if a prosecutor or defense counsel intended to use peremptory challenges for purposes of racial exclusion.

Court held that the sixth amendment guaranteed that the jury pool from which juries are selected must be a representative cross-section of the community. At the time, Louisiana law required that no woman be selected for jury service unless she had previously filed a written declaration of her desire to serve on a jury; in the Taylor case itself, there was no woman on the venire from which the jury was drawn. Reviewing earlier cases, the Court said that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. It cited Smith v. Texas, 311 U.S. 128, 130 (1940), in which it had held that the exclusion of racial groups from jury service was "'at war with our basic concepts of a democratic society and a representative government,'" and went on to say:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional and perhaps overconditioned or biased response of a judge . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

419 U.S. at 530.

As the Taylor court made clear, however, this requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community. But the fact that the connection is not direct does not mean that it is not there at all. In Williams v. Florida, 399 U.S. 78 (1970), the Court held that a

six-person jury was constitutionally acceptable; in Ballew v. Georgia, 435 U.S. 223 (1978), it held that a five-person jury was not. In each case the Court was guided by the need to draw a line that would preserve the possibility of a representative jury. In Williams, the Court indicated that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100 (emphasis added). In Ballew, likewise, the Court expressed concern "about the ability of juries truly to represent the community as membership decreases below six," 435 U.S. at 242 (emphasis added), and held that "any further reduction . . . that prevents juries from truly representing their communities, attains constitutional significance," 435 U.S. at 239. See also 435 U.S. at 245 (White, J., concurring) and 435 U.S. at 246 (Brennan, J., concurring).

That is, although the sixth amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury. It would be odd if the right to a representative jury pool did not reach, in some way or other, into the trial jury, that is, if the sixth amendment's reach stopped with the first stage of jury selection. If the sixth amendment has implications for the jury pool, it can only be because it has some implication or other for the jury that actually sits at trial. As the the Supreme Judicial Court of

Massachusetts said in Commonwealth v. Soares, 387 N.E.2d 499, 513 (Mass. 1979):

> It is not enough that there be a representative venire or panel. The desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself.

And in precisely the same vein, the Second Circuit said in McCray, 750 F.2d at 1128:

> The venire qua venire is a body that, assuredly, gives service to the community by standing ready to serve on a petit jury if called upon to do so; but it is a group that takes no action and makes no decisions. No defendant has ever been tried before a venire; the venire is not the body that deliberates in the jury room; no defendant has ever been found guilty by a venire.

Thus, as we say, it would be odd if the sixth amendment's requirement of representativeness in the jury pool were not intended to have some sort of effect in the jury room.

If the sixth amendment does guarantee something about the trial jury, then, it can only be the possibility or chance that the various groups that make up a community will be represented on the jury, and that is the conclusion that the Supreme Court drew in Williams, supra, and Ballew, supra. The six-person jury is constitutionally acceptable because it is large enough to allow for the possibility that the jury will be representative; the five-person jury is not acceptable because it does not.

This requirement that it be possible for the trial jury to be representative is not difficult to understand. For in the absence of that possibility--where members of a certain group can be excluded from service on a particular petit jury--the

negative effect upon defendants who happen to belong to that group is not difficult to imagine; and it will be especially severe where the group suffers from community prejudice. In such circumstances, the defendant may not even have the protection of the prosecutor's usual concern to bring only well-supported cases into court; for the prosecutor will know that the defendant's group will not be represented, and that he can count to some extent upon the prejudice of the community. The protection provided by the sixth amendment lies in the general requirement that the state cannot interfere with the possibility that the jury will be representative. And it is that requirement that explains the need for the jury pool to be actually representative, which would otherwise be a great mystery.

Further, in a case of this sort the perception is almost as important as the reality. Knowledge that blacks could be excluded at will by prosecutors trying black defendants, for example, would lead to cynicism among blacks in regard to the jury system. The importance of a general confidence in the accuracy of the penal system--confidence that the guilty tend to be convicted and the innocent tend to be acquitted--should not be underestimated; such confidence is crucial to the deterrent effect punishment must have. We do not increase general respect for the law by simply making it easier to get convictions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group. There must be the accompanying perception that

the law operates with some precision, tending to convict all and only those who are guilty. In the extreme case, the law would convict members of a group arbitrarily or at random; and of course in that case punishment would have no effect at all. But if members of a group that suffers from prejudice can be tried before juries from which fellow group members have been excluded, to some extent convictions may be perceived as attributable to prejudice against the group and therefore arbitrary. To the extent that they are so perceived, the purpose of punishment is defeated.

We think it is beyond dispute, therefore, that although the sixth amendment does not give the defendant the right to a representative trial jury, it assures him of the possibility that his jury will contain members of the various groups in his community.

B. The Peremptory Challenge.

The conclusion we draw is that the prosecutor ought not to be able to eliminate jurors solely on the basis of race (or sex, or religion). And yet the peremptory challenge--the exclusion of a juror without explanation or reason--is itself one of the mechanisms for insuring the impartiality of the jury; and how can that mechanism survive if the exercise of such challenges is restricted and made subject to objection?

There is no constitutional right to peremptory challenges, of course. See Swain, 380 U.S. at 219; Stilson v. United States, 250 U.S. 583, 586 (1919). Nevertheless the peremptory

challenge has a long history and serves an important function, and should not be lightly abandoned.

The point of all challenges is to remove jurors who are inclined to be biased. The peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate, or for reasons that do not reach the level of cause, of being partial to the other side. Where challenges are used in that way, the resulting jury should be closer to the ideal of a body without sympathies for either side. Since the selection of juries from the master roll is more or less random, the problem of one-sided sympathies in a group drawn for service on a particular day is not far-fetched; and thus the peremptory challenge has an important function, along with the challenge for cause, in our rough and ready system for arriving at impartiality.

And yet the peremptory challenge is in obvious conflict with the goal of securing to each defendant the chance of a representative jury. For with enough peremptory challenges, a prosecutor can, if he chooses, make sure that members of a minority group in the community do not appear on any jury on which their presence would be an inconvenience for him.

C. The Resolution.

We must choose, therefore, whether it is the peremptory challenge or the requirement of representativeness that must give way. We have no doubt that, if we were to insist on preserving the peremptory challenge as it is, immune to objection in any given case, the constitutional goal of

representativeness would be thwarted entirely. The right to a representative venire would avail no particular defendant; the appearance of particular groups on his jury would be entirely in the hands of the prosecutor. And what prosecutor is so superhuman as to neglect an opportunity granted him by law to stack the jury against the defendant? If he is a conscientious and agressive prosecutor, he will pass up the opportunity to eliminate blacks in the trial of a black only if he thinks it would do him no good, and thus blacks would be assured of the chance to have blacks on their jury only when it would make no difference. And that means that, for minority groups that have traditionally been the object of prejudice, the guarantee of representativeness would amount to nothing at all.

We think that the only option open to us, therefore, is to limit the peremptory challenge in some way. Our aim is to find a way that will require as little modification as possible.

One suggestion, implemented recently by the Supreme Court of Illinois, see 105 Ill.2d (advance sheet), April 17, 1985, p. 7, is to reduce the number of peremptory challenges available to either side. Although any reduction in the number of challenges lessens the ability of the state to prevent groups from finding places on the jury, we do not follow the Illinois court, for two reasons. For one thing, the number of challenges would have to be reduced radically to have a significant effect, and we do not think that the problem we are faced with necessitates what would amount to the practical elimination of the peremptory challenge. The Illinois rule has been changed from ten to seven in cases of this sort, a

reduction that a dissenting justice argued was too little to do much good. Id. at 9. But a more effective reduction--to three, say--is in effect an elimination of the peremptory challenge as we know it.

For another thing, more goes into the determination of the number of challenges than considerations of representativeness, and we think that the legislatures are better equipped to make that sort of determination than are the courts. For that reason, it would be inappropriate to hold that the constitution mandates a limit on the number of peremptory challenges.

The better course seems to us to be the one adopted by federal courts in the exercise of their supervisory powers over the lower courts; by some state courts, interpreting both their own constitutions and the sixth amendment; and by the Second Circuit in McCray. We hold, accordingly, that the prosecutor's right to reject jurors peremptorily is limited by the procedure to be set out below. We find that this limitation preserves the prosecutor's use of peremptory challenges except in extreme cases of discriminatory abuse.

Relying on the supervisory power and not on the constitution, a number of circuits have placed such limits on the use of peremptory challenges in federal courts. See United States v. Leslie, 759 F.2d 366, 374 (5th Cir. 1985) (en banc); United States v. Jackson, 696 F.2d 578, 593 (8th Cir. 1982), cert. denied, 460 U.S. 1073 (1983). See also United States v. McDaniels, 379 F. Supp. 1243, 1249 (E.D. La. 1974). As the Fifth Circuit said in Leslie:

> We thus invoke our supervisory power to assure a minimum level of protection against the use of peremptory challenges to practice invidious racial discrimination in individual cases. We recognize that giving effect to the precept of equality conficts with the total peremptoriness of peremptory challenges on the part of the prosecutor but hold that at some point the threat of invidious discrimination by federal officers sworn to effect justice exceeds the bounds of tolerance.

759 F.2d at 373. Nevertheless:

> We do not go so far as to hold that racial consideration in every case invariably constitutes invidious racial discrimination.

Rather,

> [t]he district court has [the burden of deciding if peremptory challenges have been used for] unjustifiable racially discriminatory reasons.

759 F.2d at 374.

State Supreme Courts in Florida, Massachusetts and California have hammered out similar compromises. State v. Neil, 457 So.2d 481 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); People v. Wheeler, 583 P.2d 748 (Cal. 1978). In Soares, the Massachusetts court said:

> In fashioning a balance between the goal of diffused impartiality in the petit jury and the limitations inherent in a feasible and fair process of jury selection, we preserve a legitimate and significant role for the peremptory challenge . . . .
>
> What we view [the Massachusetts] Declaration of Rights as proscribing is the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular defined groupings in the community. Were we to decline so to hold, we would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclude identifiable segments of that community.

387 N.E.2d at 515.

And finally in McCray, the Second Circuit chose the same sort of solution:

> [The peremptory challenge] is an important right; it may be an invaluable right in certain circumstances; but it is not a right of constitutional dimension . . . . [w]hen . . . the prosecution's use of its peremptories conflicts with a fundamental right that is protected by the Sixth Amendment, it is the inscrutability of the peremptory challenge that must yield, not the constitutional right.
>
> . . .
>
> Accordingly, we conclude that a defendant may appropriately subject to scrutiny under the Sixth Amendment the prosecution's use of its peremptory challenges on the basis of its actions in his own particular case.

750 F.2d at 1130-31.

This, as we say, seems to us the better approach. We leave to the legislatures to decide the appropriate number of peremptory challenges. We decide only that the prosecutor's use of such challenges is not unrestricted, even in the particular case; that such challenges are properly exercised against specific biases; and that the obvious abuse of those challenges is subject to the procedure set out below.

D. The Format for Protesting Abuse of the Peremptory Challenge.

In Wheeler, the California court rejected the statistical analysis used in determining discrimination in venires as inappropriate, and opted for "more traditional procedures." It has been followed in this by the Second Circuit in McCray v. Abrams; in Massachusetts, Commonwealth v. Soares, 387 N.E.2d 499 (1979); and in New Mexico, State v. Crespin, 612 P.2d 716 (N.M. App. 1980). According to the procedure adopted by these courts, the defendant must raise a timely objection and make a

prima facie case. He must show that the persons excluded are members of a cognizable group "within the meaning of the representative cross section rule." Wheeler, 583 P.2d at 764; see Soares, 387 N.E.2d at 517. Without exploring further the question just what groups these are, see Duren v. Missouri, 439 U.S. 357, 364 (1979), we note that race is surely one.

To make the prima facie case, the defendant must also show a likelihood that those challenged are more likely to have been challenged because of the group they belong to than because of any specific bias. Wheeler at 764; Soares at 517; McCray at 1132. Wheeler suggested some ways in which such a showing could be made:

> The party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group.

583 P.2d at 764. Such evidence is indeed relevant, but it may not be conclusive. If, for example, there are only three blacks on a panel, it may be more difficult to persuade a trial judge of racial animus when the prosecutor eliminates them than in the case in which there are eight blacks on a panel, and most or all are challenged. The strongest case, of course, will be where the prosecutor has used most or all of his challenges to remove most or all of the blacks on the panel. We note with approval the Wheeler admonition that the defense make "as complete a record of the circumstances as is feasible." Id.

Once the prima facie case has been made, it will be up to the prosecutor to rebut it. No court that has addressed this

issue has seen fit to require a showing of cause for each juror rejected; all that is necessary is that the prosecutor indicate some basis for supposing bias, even though it would not support a challenge for cause. The appropriate rebuttal involves bias, of course, because bias--specific bias grounded in personal history or conduct--is supposed to be the reason for challenges in the first place. "Such reasons, if they appear to be genuine, should be accepted by the court." McCray at 1132. If they do not appear to be genuine, the court will call for a new panel, and the process of selecting a jury will begin again.

Although we say, therefore, that the prosecutor has no right to peremptorily exclude jurors because of race, in practical effect what we mean is that the prosecutor may not go so far as to create a prima facie case; and if he does go that far he will be required to come up with a plausible explanation. The procedure we have set down does not in fact prevent the prosecutor from excluding two, or three, or four on the basis of race, or sex, or religion; but it should prevent him from either using his peremptories to exclude all members of a certain group, where a fair number of members of that group appear in the panel, or using all his peremptories to exclude members of a certain group. Either one will raise a presumption of intentional interference with defendant's sixth amendment rights.

All of this falls far short of destroying the peremptory challenge. The prosecutor is free to use his challenges as he chooses, so long as he does not use them for the impermissible purpose of excluding blacks, or members of other cognizable

groups, from the petit jury. We agree with the optimistic tone of the McCray opinion:

> We would think that the number of occasions in which a defendant would be able to make out a prima facie case . . . would be few; we would hope the number would decrease.

750 F.2d at 1132 (emphasis added). Indeed we would expect the number to decrease. Although we are not of the school that believes that constitutional issues are to be determined largely with an eye to the resulting burden on the courts, we are sensitive to the issue of increased litigation. In a case such as this one, uncertainty has itself led to a flow of litigation (see below, footnote 7), and we can stem the tide by resolving the issue one way or the other. If we were to decide that the peremptory challenge deserved unrestricted protection, defendants would gradually cease to raise the issue; if we decided the matter the other way, as we do, prosecutors should eventually stop the practice of excluding on the basis of race, giving fewer occasions to object, most of those easily disposed of by the trial court. Given the choice, it would be the worst sort of miscalculation to give prosecutors the go-ahead to continue the practice of exclusion just for the marginal effect it will have on the caseload.

IV.

The examination of jurors in the case before us was conducted by the trial judge. On two occasions, after the state had used six of its peremptory challenges and then again after the state had used all ten of its challenges, the defense moved for a mistrial on the grounds that the state was using

its challenges only against black jurors. The state responded to the second motion by saying that "numerous individuals that were excused were of very young years," and that the state was striving for "a balance of an equal number of men and women." The trial judge denied the motions. The Illinois Appellate Court rejected the state's explanation, but affirmed the conviction nevertheless, holding that the state's exercise of peremptory challenges could not be restricted in the absence of a Swain showing of systematic exclusion. 439 N.E.2d at 1069-71.

There is no question that a prima facie case of abuse has been made out here. Of the ten peremptory challenges the state was able to exercise in the selection of the petit jury, every one was used to excuse a black.[6] Moreover, the state's elimination of blacks had an effect: There were no black jurors on the jury finally chosen. We cannot imagine a clearer case for testing the rule.

Accordingly, the state is called upon to rebut. Since the

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[6] It is true that in the selection of the two alternates, the state exercised its one peremptory challenge against a white; but as far as we can tell, the first four jurors examined for alternate duty were all white; the defense and the state each excused one; and the remaining two alternates were both white. It is also true, as the state claims, that the defense is responsible for excusing one black from service on the jury, but the husband of that juror was a policeman and since the trial involved the shooting of a policeman the choice would seem to be justified. In any case, we do not see why the fact that the defense used one of its ten peremptories should weaken its case; it suggests that the defense was not eliminating jurors solely on the basis of race.

state did not remain silent in response to the defendant's protest, we might be able to forego a remand for a hearing into the state's explanation for its actions. For the state gave its explanation at trial, and the explanation it gave is roughly of the sort that might carry the day, if believed: it answered that it wanted to eliminate very young jurors, and to achieve some balance between males and females. Neither the Illinois Appellate Court nor the federal district court addressed the rebuttal, believing that Swain controlled in this situation. Under these circumstances, an appraisal of the rebuttal may be within our competence, eliminating the need for remand.

Nevertheless, the state may not have believed that its rebuttal was necessary, and therefore there may be some question about the fairness of taking seriously the answer that it actually gave. In these circumstances a rush to judgment may not be appropriate, and we think it better to remand for a hearing into the state's explanation than to attempt to decide the matter on the basis of the explanation already given. We are aware that an opportunity to reconsider its explanation at this late date may give the state an advantage; we have no doubt that with sufficient time an explanation could be found for the exclusion of any ten potential jurors. Still, presuming good faith on the part of the state, it is appropriate to allow the state to attempt to satisfy the district court that there was a legitimate explanation for the choices it made, and that the explanation was not pretextual.

We agree with the Illinois Appellate Court that the reason already given would appear to be pretextual. Below is a chart of jurors in the order in which they were eliminated or accepted:

ORDER OF ACCEPTANCE OR REJECTION

	STATE CHALLENGE	STATE ACCEPTANCE	DEFENSE CHALLENGE	SEATED
(1)	black male			
(2)	black female			
(3)	white male	X		
(4)	white female	X		
(5)	white male			X
(6)	black female			
(7)	black female	X		
(8)	white male			X
(9)	white male			X
(10)	black female			
(11)	white female		X	
(12)	white male		X	
(13)	black female			
(14)	black female			
(15)	white male			X
(16)	black female			
(17)	white female			X
(18)	black female			
(19)	white female			X
(20)	white male		X	
(21)	white male		X	
(22)	white male			X
(23)	white female			X
(24)	white male			X
(25)	white male			X
(26)	white male		X	
(27)	white male		X	
(28)	black female			
(29)	black female			
(30)	[peremptories exhausted]			white female
(31)	white female			
(32)	white female			

After its first challenge, every juror rejected by the state was a black woman. At that point at which the only jurors

seated were four males, the prosecution had already rejected five black women. It had also accepted three women, ultimately rejected by the defense. It is highly improbable, therefore, that in exercising its first six challenges the state was motivated to exclude women in order to achieve a balance of males and females. Of the next four jurors, all were female; the two whites were accepted by the state and seated; the two blacks were rejected by the state. By the time the tenth juror was seated, seven were male and only three female. Yet the state accepted two males, rejected by the defense, and rejected two black females. The last two women--giving the more or less balanced result of seven men and five women which the state points to in support of its explanation--were added after the state had exhausted its peremptories. Were we required to decide the matter, we would find the state's explanation that it sought to balance men and women extremely unpersuasive.

The state also claimed to be excluding jurors of "very young years." The state rejected four jurors who were college or business school students, or recent graduates; all were black women. We feel that the systematic exclusion of younger jurors would be as pernicious as the exclusion of blacks; but in any case, this explanation cannot by itself explain the state's action. This explanation we would also find less than credible.

In view, however, of the relative novelty of our holding, we believe we must remand to give the prosecution another opportunity to explain its actions. But we note that, on the

present facts, a remand would be unnecessary and perhaps undesirable in allowing the state to conjure up a rationale having little to do with the reality at trial if all parties at trial had had prior notice of today's holding. In the twenty or so years since Swain, evidence has accumulated that, if permitted, prosecutors are prepared to use the peremptory challenge to exclude blacks from juries with a cynical disregard for the rights of defendants to a jury drawn from a representative cross-section; we would suppose that the Illinois experience is more or less typical.[7] If it

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A shocking number of defendants in this State have alleged that prosecutors used peremptory challenges to exclude black people from the juries that convicted them: People v. Payne (1983), 99 Ill1.2d 135, 75 Ill. Dec. 643, 457 N.E.2d 1202; People v. Yates, (1983), 93 Ill1.2d 502 at 540, 75 Ill. Dec. 188, 456 N.E.2d 1369 (Simon, J. dissenting); People v. Cobb (1983), 97 Ill1.2d 465, 74 Ill. Dec. 1, 455 N.E.2d 31; People v. Williams (1983), 97 Ill1.2d 252, 73 Ill. Dec. 360, 454 N.E.2d 220; People v. Bonilla (1983), 117 Ill. App.3d 1041, 73 Ill. Dec. 187, 453 N.E.2d 1322; People v. Gosberry (1983), 93 Ill1.2d 544, 70 Ill. Dec. 468, 449 N.E.2d 815; People v. Davis (1983), 95 Ill1.2d 1, 69 Ill. Dec. 136, 447 N.E.2d 353; People v. Gilliard (1983), 112 Ill. App. 3d 799, 68 Ill. Dec. 440, 445 (N.E.2d 12983; People v. Newsome (1982), 110 Ill.App.3d 1043, 66 Ill. Dec. 708, 443 N.E.2d 634; People v. Turner (1982), 110 Ill. App. 3d 519, 66 Ill. Dec. 211, 442 N.E.2d 637; People v. Teague (1982), 108 Ill. App. 3d 891, 64 Ill. Dec. 401, 439 N.E.2d 1066; People v. Belton (1982), 105 Ill. Appl. 3d 10, 60 Ill. Dec. 881, 433 N.E.2d 1119; People v. Dixon (1982), 105 Ill. App. 3d 340, 61 Ill. Dec. 216, 434 N.E.2d 369; People v. Gaines (1981), 88 Ill1.2d 342, 58 Ill. Dec. 795, 430 N.E.2d 1046; People v. Mims (1981), 103 Ill. App. 3d 673, 59 Ill. Dec. 369, 431 N.E.2d 1126; People v. Lavinder (1981), 102 Ill. App. 3d 662, 58 Ill. Dec. 301, 430 N.E.2d 243; People v. Clearlee (1981), 101 Ill. App.3d 16, 56 Ill. Dec. 600, 427 N.E.2d 1005; People v. Vaughn (1981), 100 Ill. App. 3d 1082, 56 Ill. Dec. 508, 427 N.E.2d

(footnote continued on next page)

undermines public confidence in the criminal justice system to exclude blacks or women from the venire, does it not also similarly undermine public confidence to place in the hands of the prosecutor the authority to exclude all blacks from the petit jury in those cases in which he thinks it matters? What possible meaning can the sixth amendment's guarantee of a representative venire have, when the prosecutor is free to

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7 Continued

840; People v. Tucker (1981), 99 Ill. App. 3d 606, 54 Ill. Dec. 646, 425 N.E.2d 511; People v. Allen (1981), 96 Ill. App. 3d 871, 52 Ill. dec. 419, 422 N.E.2d 100; People v. Bracey (1981), 93 Ill. App. 3d 864, 49 Ill. Dec. 202, 417 N.E.2d 1029; People v. Smith (1980), 91 Ill. App. 3d 523, 47 Ill. Dec. 1, 414 N.E.2d 1117; People v. Fleming (1980), 91 Ill. App. 3d 99, 46 Ill. Dec. 217, 413 N.E.2d 1330; People v. Attaway (1976), 41 Ill. App. 3d 837, 354 N.E.2d 448; People v. Thornhill (1975), 31 Ill. App. 3d 779, 333 N.E.2d 8; People v. King (1973), 54 Ill. 2d 291, 296 N.E.2d 731; People v. Powell (1973), 53 Ill. 2d 465, 292 N.E.2d 409; People v. Patty (1972), 3 Ill. App. 3d 951, 279 N.E.2d 509; People v. Fort (1971), 133 Ill. App. 2d 473, 273 N.E.2d 439; People v. Butler (1970), 46 Ill. 2d 162, 263 N.E.2d 89; People v. Cross (1968), 40 Ill. 2d 85, 237 N.E.2d 437; People v. Dukes (1960), 19 Ill. 2d 532, 169 N.E.2d 84; People v. Harris 1959), 17 Ill. 2d 446, 161 N.E.2d 809.

People v. Payne, 457 N.E.2d 1202, 1210-11 (Ill. 1983) (Simon, J. dissenting).

It is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all blacks, or all but token blacks, from juries in criminal cases where the defendants are blacks.

People v. Gilliard, 445 N.E.2d 1293 (Ill. App. 1983).

Teague v. Lane, et al.

COFFEY, Circuit Judge, dissenting. The petitioner, Frank Teague, claims that the prosecution's use of all ten of its peremptory challenges[1] to exclude blacks from the petit jury in his case denied him his right to trial by a jury of his peers in violation of the Sixth and Fourteenth Amendments. Teague is not claiming that the prosecution systematically exercised its peremptory challenges in an effort to prevent blacks from ever sitting on petit juries. Rather, Teague argues that the prosecution's use of peremptory challenges to exclude blacks in the context of the particular facts and circumstances of his case violated his Sixth Amendment rights. As I believe the United States Supreme Court decision in Swain v. Alabama, 380 U.S. 202 (1965), is clearly controlling in Teague's case, I dissent from the majority's unwarranted departure from controlling legal precedent. Furthermore, I find the arguments advanced in support of the majority's holding to be unpersuasive.

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[1] Teague was charged with attempted murder, aggravated battery, and armed robbery. Section 115-4(e) of the Illinois Code of Criminal Procedure provides in pertinent part:

> "A defendant ... shall be allowed 20 peremptory challenges on a capital case, 10 in a case on which the punishment may be imprisonment in the penitentiary [including attempted murder and armed robbery], and 5 in all other cases.... The State shall be allowed the same number of peremptory challenges as all defendants."

Ill. Rev. Stat. Ch. 38, 115-4(e).

eliminate all members of a certain race--not in every case, granted (Swain prohibits that), but in every case in which it matters?

We vacate and remand, for a hearing into the state's explanation of its challenges and other proceedings not inconsistent with this opinion.

I.

In Swain v. Alabama, 380 U.S. 202 (1965), a black defendant was convicted of rape in the circuit court of Taladega County, Alabama. The prosecution in Swain exercised its peremptory challenges to strike all six black members of the jury venire, with the result that the petit jury that convicted the defendant was without black representation. The defendant claimed that the prosecution's use of peremptory challenges to exclude all black jurors from the petit jury in his case and the prosecution's systematic use of peremptory challenges to exclude any and all blacks from ever serving on a petit jury in a criminal case in Taladega County violated the Equal Protection Clause of the Fourteenth Amendment.[2] In part II of the Swain decision, the Court addressed the defendant's claims that the exclusion of black jurors from the petit jury that convicted him violated the Equal Protection Clause. Based on the history of the peremptory challenge and its use and operation in this country, the Court recognized merit in Alabama's contention that "its system of peremptory strikes--challenges without cause, without explanation, and without judicial scrutiny--affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." Id. at 211-12. The Court

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[2] The defendant in Swain also claimed that the the systematic underrepresentation of blacks on the grand and petit jury panels in Taladega County violated the equal protection clause. In Part I of its opinion, the Swain court concluded that the defendant failed to carry his burden of proof on that issue, stating, "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in the community is underrepresented by as much as 10%." 380 U.S. at 208-09.

outlined the history of the peremptory challenge from the days of the common law of England to the law as it has developed in the United States and concluded that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of trial by jury. ... [T]he [peremptory] challenge is 'one of the most important of the rights secured to the accused.'" Id. at 219 (quoting Pointer v. United States, 151 U.S. 396 (1894)). But the right of peremptory challenge is not limited to the accused; the Swain court recognized that "the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" 380 U.S. at 220 (quoting Hayes v. State of Missouri, 120 U.S. 68, 70 (1887)).

The Swain Court described the function of the peremptory challenge as

> "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. ... Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."

380 U.S. at 219-20. The Court further noted, "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Id. at 220. "'[I]t is, as Blackstone says, an arbitrary and capricious right, and it must be exercised

with full freedom, or it fails of its full purpose.'" Id. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)).

With respect to the use of peremptory challenges to exclude individuals on the basis of race or other group-related characteristics, the Court stated:

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable, and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. ... It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. ... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

Id. at 220-21.

The Court, addressing the facts of the case, concluded:

> "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being opened to examination, either at the time of the challenge or at a hearing afterwards. ...
>
> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it."

Id. at 221-22.[3]

Although Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, dissented from the majority opinion in Swain, the dissent did not take issue with the Supreme Court's majority holding in part II that the use of the peremptory challenge to remove blacks from a jury in a given case did not violate the Equal Protection Clause. Rather, the dissent contended that the defendant had established a prima facia case of systematic exclusion of jurors on the basis of race contrary to the majority's conclusion in part III of the Swain opinion.

> "The holding called for by this case, is that where as here a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facia case of the exclusion of negroes from juries is then made out. ... Such a holding would not interfere with the rights of defendants to use peremptories, nor the

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[3] In part III of its opinion, the court held that the defendant failed to carry his burden of proof of establishing a systematic use of peremptories to exclude blacks from all petit jurys. "[T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U.S. at 227.

> right of the State to use peremptories, as they normally and traditionally have been used.
>
> It would not mean ... that Negroes are entitled to proportionate representation on a jury. ... Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown, would the State be called upon to jusitify its use of peremptories or to negative the State's involvement in discriminatory jury selection."

Id. at 244-45 (Goldberg, J., dissenting). Thus, not one justice of the Supreme Court disagreed with the statement in Swain that "we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Id. at 222.[4] The Eighth Circuit in United States v. Carter, 528 F.2d 844, 850 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976), aptly summarized that "the Supreme Court in Swain made it clear that race or other group affiliation is in fact a legitimate ground for challenge in an individual case."

It is true that Swain was decided on equal protection grounds and that Teague's claim is based upon the Sixth Amendment right to a jury trial. Two recent opinions of this court reveal that the Swain analysis is also to be applied to claims arising in the context of the Sixth Amendment. In United States v. Clark, 737 F.2d 679 (7th Cir. 1984), the defendant raised a Sixth Amendment challenge to the prosecutor's use of peremptory challenges to exclude blacks from the petit jury that convicted her. Although the court did not reach the issue of whether the

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[4] Justice Black concurred in the result without filing an opinion.

Swain analysis is valid for Sixth Amendment claims, we noted with approval that "most courts have concluded that Swain is still good law fully applicable to federal as well as state trials." 737 F.2d at 682. We also noted that "several practical considerations support the majority approach." Id. In United States ex rel. Palmer v. DeRobertis, 738 F.2d 168 (7th Cir.), cert. denied, 105 S.Ct. 306 (1984), the petitioner, a black, contended that "he was denied his right to a trial by an impartial jury ... by the prosecution's peremptory challenge of blacks, with the result that no member of the jury belonged to his race." Id. at 171. The district court held that the petitioner's failure to comply with state procedural rules waived his right to raise the issue in a habeas corpus proceeding absent a showing of the cause for and the prejudice resulting from the procedural default. In determining whether the petitioner was prejudiced by the waiver, we concluded, "This case is controlled by Swain and its progeny." 738 F.2d at 172.

With the sole exception of the Second Circuit, the United States Courts of Appeals that have addressed the validity of Swain in the Sixth Amendment context have concluded that the prosecution's alleged use of peremptory challenges along racial lines in the selection of a petit jury does not deprive a defendant of the Sixth Amendment right to a trial by a jury. See United States v. Thompson, 730 F.2d 82, 85 (8th Cir.), cert. denied, 105 S.Ct. 443 (1984); Prejean v. Blackburn, 743 F.2d 1091, 1103-04 (5th Cir. 1984); United States v. Whitfield, 715 F.2d 145, 146-47 (4th Cir. 1983); Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983), cert. denied, 104 S.Ct. 719 (1984); cf. Willis v. Zant, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), cert. denied, 104

S.Ct. 3546 (1984). Moreover, in 1983 the Supreme Court declined to grant certiorari in a case that presented the Court with an opportunity to re-examine whether the Swain analysis is applicable in the context of the Sixth Amendment. McCray v. New York, 103 S.Ct. 2438 (1983).[5]

From my research to date, I note that only the Second Circuit in McCray v. Abrams, 750 F.2d 1113 (1984), petition for cert. filed, 53 U.S.L.W. 3671 (U.S. Mar. 4, 1985) (No. 84-1426),[6] has departed from the Swain analysis in holding that the prosecution's use of peremptory challenges to exclude all blacks from the petit jury in a given case violates a defendant's Sixth Amendment right to trial by jury. But the precedential value of McCray is suspect due to the state's concession in that case that the exercise of peremptory challenges to exclude potential jurors from a petit jury solely on the basis of race

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[5] Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari on the ground that "Swain was decided before this Court held that the Sixth Amendment applies to the states through the Fourteenth Amendment ... [and] should be reconsidered in light of Sixth Amendment principles established by our recent cases." 103 S.Ct. at 2441 (Marshall, J. dissenting). Justice Stevens' opinion denying certiorari, joined by Justices Blackmun and Powell, acknowledged the importance of the issue, but concluded that the Supreme Court should allow the States to serve as "laboratories in which the issue receives further study before it is addressed by this Court." 103 S.Ct. at 2439 (Stevens, J.).

[6] Following the Supreme Court's denial of certiorari in McCray v. New York, 103 S. Ct. 2438 (1983), McCray filed a petition for habeas corpus relief in the district court. The district court, relying on the opinions accompanying the Supreme Court's denial of McCray's petition for certiorari, concluded that Swain v. Alabama was no longer good law and granted McCray's petition. McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983). The state appealed.

violates the Sixth and Fourteenth Amendments,[7] id. at 1114, with the result that the issue of whether a potential petit juror may be peremptorily challenged on the basis of race was never raised, discussed, much less argued, before the Second Circuit panel that decided McCray. Furthermore, one of the reasons given by the McCray court in rejecting the Swain analysis was the McCray court's belief that whites are not subject to being peremptorily challenged on racial grounds.[8] Without any supporting documentation or data, McCray posited that "as a practical matter, the prosecution does not peremptorily exclude whites simply because they are whites." 750 F.2d at 1121. This premise was contradicted in Roman v. Abrams, 608 F.Supp. 629 (D.C.N.Y. 1985), one of the first reported district court decisions applying McCray, where the district court held that the prosecution's use of its eleven peremptory challenges to exclude whites from the jury that convicted a white defendant established a prima facia case that the white jurors were excluded solely because of their race. Id. at 642. Thus, McCray cannot reasonably be construed as authority for the proposition that the exercise of peremptories on the basis of race in the selection of petit juries violates the

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[7] The state contended that the petitioner had not established a prima facie case that the prosecution used its peremptories to exclude blacks solely on the basis of race, and that if a prima facie case was established, the state was entitled to an evidentiary hearing to rebut the prima facie case. McCray, 750 F.2d at 1114.

[8] The Supreme Court in Swain reasoned to the contrary and in fact stated that "in the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." 380 U.S. at 221.

Sixth and Fourteenth Amendments since that issue was never raised or discussed, much less argued, before the court and more importantly it was based in part on an unfounded premise that peremptory challenges are not used to exclude whites from petit juries because of their race.

The majority's excursion into constitutional decisionmaking contrary to the mandates of the nation's highest court is unwarranted in light of the precedent in Swain, the decisions in this and other circuits affirming the validity of Swain in the Sixth Amendment context, and the Supreme Court's refusal to reevaluate Swain in its denial of certiorari in McCray v. New York. This court sits "on the shores of Lake Michigan rather than the banks of the Potomac," Vail v. Board of Education of Paris Union School District No. 85, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring), aff'd 466 U.S. 377 (1984), and consequently we "must follow the decisions and interpretations of our highest court in spite of any individual predilections" we individually might possess. United States v. Chase, 281 F.2d 225, 229 (7th Cir. 1960). "Needless to say, only [the Supreme Court] may overrule one of its precedents." Thurston Motor Lines v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam).

The majority attempts to justify its departure from the bending precedent in Swain by construing Justice Stevens' opinion denying certiorari in McCray v. New York, 103 S.Ct. 2438 (1983), somehow as an invitation to federal courts to address the validity of Swain in the Sixth Amendment context in spite of the opinion's limited and exclusive reference to the States. Justice Stevens stated, "[I]t is a sound exercise of discretion for the Court to

allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." 103 S.Ct. at 2439 (Stevens, J.) (emphasis added). Justice Stevens' limiting language absolutely expresses no such invitation to federal courts. After recognizing the important "substantive and procedural ramifications of the problem," id. at 2438, the opinion acknowledged that as of that date only two States out of fifty had ruled that a criminal defendant's rights under their respective state constitutions were violated in certain circumstances by the prosecutor's use of peremptory challenges to exclude members of cognizable groups from petit juries. Justice Stevens noted that the procedural and substantive issues associated with judicial review of peremptory challenges were being litigated in the States of Massachusetts and California. Thus, despite Justice Stevens limited "invitation" to the states, the majority grasps the gauntlet and charges forward to interpret Justice Stevens' opinion, along with the dissent from the denial of certiorari of Justice Marshall, joined by Justice Brennan, somehow as evidence that five justices have "effectively urged the lower courts to consider the issue." In contrast to the majority's conclusion, but consonant with Justice Stevens' reasoning and the Supreme Court's refusal to reconsider the constitutionality of the Swain analysis in the Sixth Amendment context, I am convinced that we must follow the Supreme Court's ruling and reasoning in Swain and exercise the proper respect and discretion due the United States Supreme Court and allow our nation's highest Court the opportunity to observe, review and evaluate the experiences of State courts as they interpret their

respective State constitutions.[9]

II.

Not only is the majority's holding in this case an unwarranted departure from valid and sound precedent, but the rationale advanced by the majority to support its holding is unpersuasive. The majority asserts that "the problem arises in the first place out of the clash between two devises, both intended to secure the impartiality of the jury ...: the peremptory challenge and the requirement of representativeness in the jury pool." Initially, it is obvious that there is no direct conflict between the two devices, as peremptory challenges only come into play during the selection of the petit jury, after a jury pool has been drawn and selected for a particular trial. Thus, the peremptory challenge does not "clash" with the right of a defendant to have his jury drawn from a representative jury pool. The majority manufactures a clash between the peremptory challenge and the requirement of representativeness in the jury pool only by extending the cross section requirement beyond the parameters of the area of concern delineated in the decisions of the Supreme Court.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme Court held that the systematic exclusion of women from the jury pool denied the defendant his right to trial by an impartial jury drawn from a venire representing a cross-section of

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[9] Since the Supreme Court has granted certiorari in Batson v. Kentucky, 105 S.Ct. 2111 (1985), a case presenting the issue of whether the Swain analysis applies in the Sixth Amendment context, the majority's attempt to predict the Supreme Court's ruling on the issue is nothing more than needless and unwarranted speculation.

the community. Id. at 535-36. The Court emphasized:

> "[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, ... but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups from the community and thereby fail to be reasonably representative thereof."

Id. at 538. Taylor focused on two facets of the jury selection process not present in the case before us. First, the Court required that a fair cross-section of the community be represented on jury venires and pools, but not on the specific petit jury selected for a particular case.[10] Second, the fair cross-section requirement prohibits only the systematic exclusion of prospective jurors from the entire pool or venire--that is the exclusion of jurors that is "inherent in the particular jury

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[10] It has been suggested that the Court's refusal to extend the cross-section requirement to a petit jury can be explained by several factors. First, the process of random selection may result in the under- or overrepresentation of particular groups on a venire and the removal of jurors for cause likewise may result in the under- or overrepresentation of a group on a petit jury in a given case. Second, the requirement that specific groups be represented on any given petit jury would entail tremendous administrative problems; in each case, the trial court would be called upon to examine the race, nationality, religion, occupation, and other characteristics of members of the community in relation to the facts and circumstances of the case on trial and determine which groups of the population were relevant, and thus essential to the composition of each and every petit jury. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L.Rev. 337, 347-48 n.47 (1982).

selection process used." Duren v. Missouri, 439 U.S. 357, 366 (1979).[11] Thus, the majority is absolutely correct in asserting "[T]his requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community." But the majority, in order to reach a desired result, confuses the issue of the jury pool requirement and attempts to expand the cross-section requirement into the selection of the petit jury as Teague does not claim that the pool from which his jury was drawn failed to contain a fair cross-section of the community; his quarrel is with only the make-up of the petit jury (12 jurors plus 2 alternate jurors) that heard his particular case. Nor does Teague claim that it was common practice in Cook County, Illinois, to systematically exclude blacks from all petit juries. His claim is confined to the context of his specific trial. Thus, the holdings in Taylor and Duren that members of a cognizable group may not be systematically excluded from the jury venire or pool do not provide the appropriate means for analyzing Teague's claim that the use of peremptory challenges to exclude all blacks from his petit jury violated his Sixth Amendment right to trial by jury.

The majority seeks to expand and enlarge upon the reasoning of Taylor by discussing Williams v. Florida, 399 U.S. 78

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11 "In order to establish a prima facia violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979).

(1970), and Ballew v. Georgia, 435 U.S. 223 (1978). In Williams the Supreme Court held that six person juries in state criminal trials were constitutional under the Sixth and Fourteenth Amendments. Eight years later in Ballew the court held that five person juries in state criminal trials were unconstitutional. The majority asserts that in deciding Williams and Ballew, the Supreme Court was "guided by the need to draw a line that would preserve the possibility of a representative jury." Yet, while Williams and Ballew pertain specifically to the composition of petit juries, when viewed in the proper context, they militate against the holding of the majority: the six person jury approved in Williams certainly does not guarantee that the jury will consist of a representative cross-section of the community. The Court in Williams stated:

> "[E]ven the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, ... the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one."

399 U.S. at 102 (emphasis added). The Court nevertheless recognized in Ballew, "[T]he opportunity for meaningful and appropriate representation does decrease with the size of the panels." 435 U.S. at 237. Thus, it can hardly be doubted that the mathematical probability of obtaining a representative cross-section of the community is reduced when a jury is chosen consisting of six rather than twelve jurors. Notwithstanding the Court's recognition that smaller juries counteract the goal of meaningful and appropriate representation on the petit jury, the

Court in Ballev refused to retreat from its holding in Williams. The Supreme Court thus recognized that merely decreasing the possibility of obtaining a fair cross-section of the community on the petit jury does not violate the Sixth Amendment right to a trial by jury. Similarly, the right to the unrestrained exercise of peremptories in the context of the facts and circumstances of a particular case may decrease the possibility of obtaining a truly representative petit jury in a given case, but does not violate the Sixth Amendment right to a jury trial where the peremptories are not exercised systematically to exclude a cognizable group.

The majority states: "It would be odd if the right to a representative jury pool did not reach, in some way or other into the trial jury. ..." The majority thus implies in their condemnation of the peremptory challenge that the requirement of a fair cross-section on the jury venire or pool is meaningless if the prosecutor can use his peremptory challenges to exclude a member of a cognizable group from the petit jury in a given trial. However, the free and unrestrained exercise of the peremptory challenge does not eliminate the effect of representativeness in the jury pool. Judge Garwood cogently noted the beneficial effect of requiring representativeness in the jury pool despite the fact that individual jurors might be excluded from the petit jury by means of peremptory challenge:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) in its capacity as the neutral structurer of the overall justice system has generally determined that those excluded are unfit to try any case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed litigants in

> the trial phase of our adversary system of justice, that the challenged venireperson will be more unfavorable to that litigant in that particular case, than the others on the same venire.
>
> Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks a priori across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusions from venires focuses on the inherent attributes of the excluded group and infers its inferiority, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not. For instance, it says nothing adverse, or either truly racial, about blacks to infer that they may be more likely to have greater antipathy to the Klu Klux Klan than whites."

United States v. Leslie, 759 F.2d 366, 392, reh'g granted, 761 F.2d 195 (5th Cir. 1985)[12] (Garwood, J., dissenting) (emphasis original).

Commentators have also noted that the requirement that

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12 In United States v. Leslie, 759 F.2d 366, reh'g granted, 761 F.2d 195 (5th Cir. 1985), the Fifth Circuit exercised its supervisory power over federal district courts and federal prosecutors to conclude that "the federal prosecutor's ... right to employ peremptory challenges without review must yield on those cases where the defendant can establish that the prosecutor misused those challenges and engaged in invidious racial discrimination." 759 F.2d at 374. But the court specifically stated, "[W]e ... need not and therefore do not consider whether the prosecutor's conduct in this case violated any of Leslie's constitutional rights." Id. As discussed below, an examination of the record in this case discloses that the prosecutor in Teague's case did not engage in invidious racial discrimination, but exercised his judgment based upon his experience and knowledge to exclude those jurors who, as revealed in voir dire questioning, would in his best judgment be unable to be fair and impartial in the context of the specific facts and circumstances of Teague's case.

jury pools represent a fair cross-section of the community has an impact on the petit jury notwithstanding the free exercise of preemptory challenges. For example:

> " The effects of eliminating an individual from a jury by the peremptory are also sufficiently unlike those of eliminating the same individual by exclusion from the jury pool that the simple rationale of Taylor does not apply. A venire member who is challenged peremptorily still has some effect on the ... impact of the jury simply by being on the venire, and hence is unlike an individual who is eliminated prior to that point. For example, if the formerly excluded women who are added to the jury venire after Taylor [are more likely to convict] than any other venire members, they will be challenged by the defense in place of the next least conviction-promoting venire members, who otherwise would have been removed. Thus, the [likelihood of conviction] will rise, even though the newly included women are removed by the peremptory."

Note, Peremptory Challenges and the Meaning of Jury Representation, 89 Yale L.J. 1177, 1192 (1980); see also Saltzburg & Powers, supra at 360.

The majority also contends that the defendant may not have the benefit of the prosecutor's concern to bring only well-supported cases into court if the prosecutor knows he can exclude all of the members of a cognizable group by means of the peremptory challenge, "for the prosecutor will know that the defendant's group will not be represented [on the petit jury], and that he can count to some extent upon the prejudice of the community." I do not agree. Initially, the record is barren of any community prejudice towards Teague, the defendant in this case. The majority assumes, without providing any supporting evidence, that a black defendant is subject to prejudice in Cook County, Illinois. I note that Cook County had a significant

number of blacks in the population providing a supply of potential black jurors to establish an appropriate balance in the jury pool at the time of Teague's trial as the population of Cook County was approximately 25% black. Thus, the majority cannot, without factual support, brazenly conclude that Teague, as a black, was subject to community prejudice in the administration of justice. Second, when a prosecutor decides to bring a defendant before the bar of justice and issues an indictment or an information, he has no way of knowing the composition or make-up of the particular jury pool from which the petit jury will be selected. Without such knowledge, the prosecutor cannot predict whether the number of peremptory challenges he is allowed will permit him to exclude all the members of the group or segment of society he wishes to exclude. For example, in Teague's case, the prosecutor had ten preemptory challenges; 36 prospective jurors were examined on voir dire before the petit jury was accepted and 4 of the prospective jurors were excused for cause. When the prosecutor brought Teague's case to trial, he could in no way predict that only 11 of the 32 prospective jurors not excused for cause would be black, thus allowing him to exclude all but one black juror (the defense exercised one of its peremptories to exclude the remaining black). Had random selection produced a jury pool containing 20 blacks rather than 11, the prosecutor would have been unable to exclude all blacks from the jury--if in fact, as the majority assumes in this case, the prosecutor desired to exclude all blacks. Judge Garwood made a similar observation:

> "[T]he general exclusion from venire pools allows the prosecutor (and the potential defendant as well) greater ability to predict, in advance of the decision to prosecute, the

> composition of the jury which will try the case. If no cognizable group is excluded from the venire formation process, the decision to prosecute (or to commit an offense) normally cannot be made with assurance that any given group will not be so represented on the particular venire from which the trial jury will be drawn that it cannot be eliminated by peremptory challenges (or can be eliminated only at unacceptable costs in terms of other peremptories foregone)."

Leslie, 759 F.2d at 393 (Garwood, J. dissenting). Thus, the free and unrestrained exercise of peremptory challenges does not eliminate the possibility of obtaining a truly representative trial jury. So long as the jury pool contains a fair cross-section of the community, the possibility of obtaining a representative trial jury remains regardless of how either party exercises its peremptory challenges. Thus, I am in agreement with the majority when it states, "[A]lthough the sixth amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury." But as explained above, the exercise of peremptory challenges does not eliminate the possibility and/or probability of a representative petit jury.

Further, the majority asserts:

> "Knowledge that blacks could be excluded at will by prosecutors trying black defendants ... would lead to cynicism among blacks in regard to the jury system. The importance of a general confidence in the accuracy of the penal system--confidence that the guilty tend to be convicted and the innocent tend to be acquitted--should not be underestimated; such confidence is crucial to the deterrent effect punishment must have. We do not increase general respect for the law simply by making it easier to get convictions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group."

Once again the majority has made bold, unsupported, and

unwarranted assumptions concerning the functioning of our criminal justice system. Initially, the majority focuses on the "deterrent effect" of punishment, but the primary aim of punishment is not at members of society at large or members of a convicted defendant's racial or ethnic group; rather punishment is aimed primarily at deterring the convicted criminal from committing further crimes and second at deterring others from committing like crimes. Our goal is to ensure that each accused receives a fair and impartial trial, and as discussed below the use of the peremptory challenge furthers rather than hinders the selection of a fair and impartial jury in any given case. Second, the majority assumes that the exercise of peremptory challenges "make[s] it easier to get convictions" without any statistical data or factual information to support the premise. Such unsupported suppositions hardly provide an adequate basis for the radical departure from the recognized and binding precedent in Swain suggested by the majority.

The majority's analysis ignores the fact that the peremptory challenge is an essential tool not only to the prosecutor, but to the defendant as well, in their combined effort to obtain a fair and impartial petit jury in their search for the truth of the facts presented and ultimate justice for all. The "system of peremptory [challenges]--challenges without cause, without explanation, and without judicial scrutiny--affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." Swain, 380 U.S. at 211-12. And the peremptory challenge "'is, as Blackstone says, an arbitrary and caricious right, and it must be exercised

with full freedom, or it fails of its full purpose.'" Id. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)). The Sixth Amendment literally provides, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." (emphasis added) "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961) (emphasis added). Although the Sixth Amendment provides protection only for the defendant, if we believe that the American system of justice is based on the premise that a jury trial is a search for the truth, we must acknowledge that both sides are entitled to an impartial jury. Thus, courts have recognized that "[T]he state also enjoys the right to an impartial jury." Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). "[T]he system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution Between him and the State, the scales are to be evenly held.'" Swain, 380 U.S. at 220 (quoting Hayes v. State of Missouri, 120 U.S. 68, 70 (1887)); Spinkellink, 578 F.2d at 296.

Both the peremptory challenge and the requirement of a representative venire advance the constitutional goal of obtaining a fair and impartial jury in the undying quest and search for justice. And it may be that the requirement that a jury venire or pool represent a fair cross-section of the community in fact increases the necessity of employing peremptories to obtain an impartial petit jury. "In contrast to the course in England, where both peremptory challenge and challenge for cause have

fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society." Swain, 380 U.S. at 218 (emphasis added). The Swain court acknowledged that the "peremptory challenge is a necessary part of trial by jury." Id. The Court recognized that the challenge for cause alone is insufficient to assure the impartiality of the jury in a given case. "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Id. at 220. Commentators have likewise noted the shortcomings of the challenge for cause:

> "[Challenges for cause] depend upon the juror's admitting actual bias or grounds for implied bias. Some jurors will intentionally deceive the court, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant. Other jurors simply are not aware of their prejudices or underestimate the impact of their biases on their ability to weight the evidence."

Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 544 (1975); see also Saltzburg & Powers, supra at 356 ("The detection of subconscious bias is too intuitive and subjective to justify a judicial pronouncement that a juror is unable to render an impartial judgment."). Thus, courts have found it proper to exercise a peremptory challenge to exclude a juror who could not be dismissed for cause in the context of a given trial. See Dobbert v. Strickland, 718 F.2d 1518, 1524-25 (11th Cir. 1983); Jordan v. Watkins, 681 F.2d 1067, 1070 (5th Cir. 1982).

In addition to providing for the exclusion of jurors whose bias may not be able to be discovered on voir dire, the peremptory challenge frequently facilitates the exercise of a challenge for cause to the ultimate satisfaction of the parties and the relief of potentially embarrassed jurors. We must not forget that thorough and exhaustive questioning on voir dire, although not always establishing a basis for removal for cause, oft times alienates a juror to such a degree that it is necessary for the good of all concerned to strike that juror peremptorily. Without having the peremptory challenge to fall back on, counsel will have to be much more circumspect and timid in voir dire questioning to avoid alienating a juror and thus may be less effective in discovering a prospective juror's bias and ultimately less successful in fulfilling the underlying goal of obtaining a fair and impartial jury. See Babcock, supra at 555. In this vein, the Court in Swain noted, "the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." Id. at 219-20. Consequently,

> "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice." 349 U.S. 133, 136 (1955).'"

Swain, 380 U.S. at 219 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

In selecting a petit jury for a specific case, the exercise of the peremptory challenge is merely "the tactical determination of one contesting litigant's counsel that the challenged person is, under the discrete facts of that particular case, more likely to favor the other side." Leslie, 759 F.2d at 392 (Garwood, J. dissenting). As Saltzburg & Powers observed:

> "Parties ... are faced with a particular case, specific evidence, and a designated group of jurors from which to pick. They want individual jurors who will be fair to them and thus they seek a proxy, whether race or something else, that relates to the specifics of their case. The proxy must be helpful in identifying partiality, not generally, but in a very specific context."

Saltzburg & Powers, supra at 360. According to the Supreme Court, peremptory challenges may be

> "exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

380 U.S. at 220-21. Consequently, "an attorney has not only a right but an obligation to challenge a prospective juror who may be biased, even if the basis of her belief is a broad generalization, which may not in fact be true." McCray v. Abrams, 750 F.2d at 1138 (Meskill, J., dissenting) (emphasis original). Thus, to further the constitutional goal of obtaining a truly fair

and impartial jury to the best of his ability, a prosecutor or a defense attorney may at times take race or other group characteristics into account when he exercises a peremptory challenge in the context of the specific facts and circumstances of the particular case being tried. An attorney may well be subject to malpractice litigation if in fact he fails to take all relevant factors in the context of the case on trial into consideration when exercising peremptory challenges.

The majority asserts that, because of the perceived clash between peremptory challenges exercised in the course of selecting a petit jury and the requirement of representativeness in the jury pool, we must choose whether it is the peremptory challenge or the requirement of representativeness that must give way. But such a choice is not necessary. The majority goes out on an unsupported limb and states, "[I]f we were to insist on preserving the peremptory challenge as it is, immune to objection in any given case, the constitutional goal of representativeness would be thwarted entirely." As discussed above, the use of peremptory challenges in any particular case does not and cannot logically thwart the constitutional goal of representativeness, and we know of no Supreme Court case or recognized legal treatise that has ever held that the constitutional requirement of a representative cross-section reaches the petit jury in a particular trial. In fact, the case holdings are to the contrary as the Supreme Court has wisely and clearly mandated "defendants are not entitled to a jury of any particular composition." Taylor, 419 U.S. at 538. Thus, only by expanding and enlarging upon the cross-section requirement of the jury pools and venire can the majority claim

that the peremptory challenge interferes with the constitutional goal of representativeness.[13]

The majority further contends that an aggressive prosecutor would "pass up the opportunity to eliminate blacks in the trial of a black only if he thinks it would do him no good, and thus blacks would be assured of the chance to have blacks on their jury only when it would make no difference." This assumption is nothing more than a gratuitous comment, purely specious, untrue, and again without any factually documented support. The majority itself recognizes that "the peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate, or for reasons that do not reach the level of cause, of being partial to the other side." An aggressive prosecutor would thus use the peremptory challenge to exclude from the petit jury only those jurors he perceives to be partial to the defendant and aggressive defense counsel would peremptorily challenge those particular jurors he perceives to be partial to the prosecution. Accordingly, if a black defendant is

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13 The majority's reliance on the recent Sixth Circuit decision in Booker v. Jabe, No. 83-1136 (6th Cir. October 24, 1985) is suspect. The Sixth Circuit in the Booker decision and the majority in this case fail to make the critical distinction between the Sixth Amendment as it applies to the selection of members for the jury pool and the Sixth Amendment and the role of the peremptory challenge in selecting an impartial jury. Further, as in McCray, the prosecutor in Booker did not challenge the finding that he exercised his peremptory challenge on the basis of race to exclude blacks from the jury. In fact, the prosecutor noted that the reason he struck the black jurors from the petit jury was because the defense was using its peremptory challenges to strike all white jurors from the jury panel. Thus, I question the majority's characterization of the Booker decision as employing a "standard [that] is substantially identical to our own..." Majority opinion at 9, n.5.

on trial, the prosecutor would exclude a juror only if he perceived in the exercise of his best reasoned judgment, that the particular juror, white or black, would be partial to the defendant. The majority is once again guilty of making a bold unsupported statement in assuming that a prosecutor would always perceive black jurors to be the most partial towards a black defendant and denies reality and the facts of life. "[F]or instance, if a black college student is being tried in a draft registration case, the prosecutor may prefer to challenge a white social worker rather than a black veteran." McCray, 750 F.2d at 1138 (Meskill, J., dissenting).[14] The majority has also failed to provide any statistical data that has stated, much less proven, that a white juror is more likely to convict a black defendant than a black juror, or that a black juror is more likely to convict a white defendant than a white juror. Further, the majority has ignored the fact that the impact of the oath

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[14] Saltzburg & Powers suggest that the peremptory challenge incorporates an internal check against the misuse of peremptories.

> "[A] party who insists on challenging jurors on the basis of questionable stereotypes increases his chances of removing friendly jurors and decreases his opportunitites for excluding more biased veniremen, thus reducing the possibility of success at trial. If assessments of a juror's prejudices based on group affiliation is accurate, however, then counsel has exercised the challenge as it was intended--to remove the most partial jurors.
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> There are real opportunity costs, then, in exercising peremptory challenges for the wrong reasons. Those who strike jurors on grounds of race or sex or some other classification that is not a very good proxy for bias miss opportunities for more selective strikes and thus risk having a jury that is not as impartial as it might be."

Saltzburg & Powers, supra at 365.

administered to jurors is the same whether the juror be black or white. Nothing suggests that a white is any less sincere than a black, or that a black is any less sincere or dedicated than a white when the particular juror swears under oath that he will be fair and impartial and will only decide the facts of the case on the basis of the evidence presented in open court and the law as presented in the jury instructions. I believe it is unfair to assume, and there is no basis for believing that the racial make-up of the jury in this case in any way affected the defendant's constitutionally guaranteed right to a fair and impartial jury.

Since the "clash" between the peremptory challenge and requirement of representativeness perceived by the majority is based upon an unwarranted and expansive interpretation of the fair cross-section requirement and unfounded conjecture concerning the prosecutor's use of peremptory challenges in a given case, there is no need to choose between one or the other. As noted above, the peremptory challenge and the fair cross-section requirement are both necessary safeguards employed in reaching the ultimate constitutional goal of obtaining a fair and impartial jury in a given case in our never-ending search for the truth and ultimate justice in the American judicial system.

Further, even if a choice between the peremptory challenge and the fair cross section requirement is necessary, it need not be the peremptory challenge that yields. In Swain, the Court quoted the often cited language of Stilson v. United States, 250 U.S. 583, 586 (1919), that "[t]here is nothing in the Constitution of the United States which requires the Congress [or

the States] to grant peremptory challenges." 380 U.S. at 219 Yet the Swain court found the peremptory challenge to be so entwined with the concept of a fair jury trial that it upheld the unrestrained use of peremptory challenges in any given case against a claim that such use of the peremptory challenge violated the Equal Protection Clause of the Fourteenth Amendment. The Court concluded:

> "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being opened to examination, either at the time of the challenge or at a hearing afterward.

Swain, 380 U.S. at 221-22.

In fact, Professor Babcock concluded that "Swain's approach to the importance of the peremptory challenge is so radically different from Stilson's ... that it could be read as a virtual overruling of Stilson." Babcock, supra at 556.[15]

Finally, the majority ignores the practical effect of its holding--the elimination and eradication of the peremptory challenge as we know it. It is ironic that the majority rejects the remedy of placing a limit on the number of peremptory challenges available to the prosecution because to be effective it

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15 Babcock notes that Stilson was based on a reading of history that has been subject to revision and correction. "[C]ontrary to the implications of Stilson, the Court in Swain found that from the time of the first jury trials, peremptory challenges were allowable in noncapital felonies." Babcock, supra at 556.

would "eliminat[e] [for all time] ... the peremptory challenge as we know it" and its value in our search for justice. In subjecting the prosecutor to an examination of his motives for excercising peremptory challenges, the majority has effectively eliminated the essential nature of the peremptory challenge. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain, 380 U.S. at 220. The peremptory challenge "is, as Blackstone says, an arbitrary and capricous right, and it must be exercised with full freedom, or it fails of its full purpose," Lewis v. United States, 146 U.S. at 378, and "any system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." Pointer v. United States, 151 U.S. 396, 408 (1893). Judge Meskill clearly recognized the effect of subjecting the prosecutor's motives to examination when he stated "the result the majority reaches spells the end of the peremptory challenge as an effective jury selection tool." McCray, 750 F.2d at 1139 (Meskill, J., dissenting).

As we have previously recognized,

> "If such objections are allowed, it is hard to see how the peremptory challenge which has been called a 'necessary part of the trial by jury,' Swain v. Alabama, supra., 380 U.S. at 219, ... will survive. Whenever counsel alleged that his opponent had a racial or similar type of motivation in exercising a perepemptory challenge (whether he used that challenge to exclude a white or black--and it would have to be one or the other--or, extending the principal as one could hardly resist doing, a man or a woman, a Jew or a gentile, etc.) the opponent would have to come forward with a reason for wanting to exclude the juror. In other words he would have to

> provide good cause, or something very close to it; and the peremptory challenge would collapse into the challenge for cause."

Clark, 737 F.2d at 682. In Clark, we also noted "the potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." Id. Increasing the extent of voir dire examination to provide counsel with relevant information concerning juror biases is unnecessary, time-consuming and costly. After all, "[t]he Constitution guarantees [a defendant] a fair trial, not a perfect one." United States ex rel Crist v. Lane, 745 F.2d 476, 482 (7th Cir. 1984); see also Lutwak v. United States, 344 U.S. 604 (1958). Further, subjecting prospective jurors to an all-inclusive detailed interrogation without any restraints in open court not only impedes the timely search for justice, but all too frequently forces jurors to disclose embarrassing and immaterial information or unpopular views, and frequently generates hostility toward the litigants or the judicial system. See Saltzburg & Powers, supra at 361, 369.

The impact of the majority's holding would not be limited to the prosecution alone, but the defendant would ultimately suffer as well. As previously noted, if we believe that both the prosecution and the defendant are entitled to a fair trial, the prosecution, as well as the defendant, is entitled to an impartial petit jury. Spinkellink, 578 F.2d at 596. Thus, as we noted in Clark:

> "It would be hard to argue that only a defendant should be allowed to challenge racially motivated peremptory challenges. ... As it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant, and not when it harms the law abiding community represented by the prosecutor, the prosecutor would be allowed to object to the defendant's making racial peremptory challenges if the defendant could object to the prosecutor's doing so. Maybe it would be better--not least from the defendants' standpoint--if neither counsel are allowed to object."

737 F.2d at 682; see also United States v. Newman, 549 F.2d 240, 250 n.8. (2nd Cir. 1977).

A further practical problem in the majority's analysis is determining when a defendant has established a prima facie case of peremptory challenges exercised on the basis of race. In Teague's case, 10 blacks were peremptorily challenged by the prosecution. But what if only five blacks had been in the jury pool and the prosecution challenged all five--would the peremptory challenge of the only five black prospective jurors demonstrate that the challeges were based on race? Or what if only two blacks were members of the jury pool? A line must be drawn somewhere, but the majority offers no guidance for determining when a defendant establishes a prima facia case of peremptory challenges impermissably based on race, but blatantly would have us cast aside the peremptory challenge as we know it and accept it today as an integral component of the American system of justice. Nor does the majority offer any guidance for determining what group characteristics may permissably be the basis of a peremptory challenge. The majority holds that race is an improper basis for peremptory challenge, but says nothing about such group characteristics as sex, age, religion, occupation, education, political affiliation, or socio-economic status. Again, the line must be drawn somewhere, but we get not even a hint from the

majority where that line should be drawn. Thus, in its attempt to do away with the peremptory challenge, the majority has failed to delineate any outer limits for the analysis it has adopted and invites endless litigation as defendants will doubtless press claims suggesting that every conceivable group characteristic is inappropriate as a basis for the exercise of peremptory challenges.

I am convinced that to fulfill its function in our constitutionally guaranteed system of trial by jury, the exercise of peremptory challenges by either party--prosecution or defense--must not be subjected to examination by the court. In this case, however, I examine the record of the voir dire in detail, including the questioning of the jurors, because of what I perceive to be a most serious unfounded accusation on the part of the defendant and his attorney that the state exercised their peremptory challenges solely on the basis of race and the majority's unfounded conclusion that a "prima facie case of abuse has been made out here." For the majority to say that the state excluded jurors on the basis of their race is unfair and inaccurate and glosses over the facts in the record. An in depth examination of the record reveals that an appropriate and valid justification existed for each and every challenge exercised by the state. Of the ten jurors excused by the state, three had family or friends involved in law enforcement; three either were victims of crimes or had family members who had been victims of crimes; two had either personally been convicted of an offense or had a family member who had been convicted of an offense; two were students with unusual demands on their time; and three jurors or members of their family had been treated by psychiatrists.

(Teague's sanity was a central issue at his trial.) Although I again must emphasize that such a review of the record to justify peremptory challenges is neither the duty nor province of the court, the record in this case clearly demonstrates that the state's exercise of peremptory challenges were fully justified and appropriate in the context of the facts and circumstances of Teague's case. The voir dire's value once again was established and an examination of the record revealed and raised legitimate concerns of the challenged juror's perceived ability to be impartial. Each of the factors recited above suggests that the prospective jurors might very well have had a subconscious partiality with respect to issues that were to be decided by the jury. Thus, these were not arbitrary exclusions of prospective jurors but were challenges based upon the prosecutor's exercise of sound judgment in the context of the facts and circumstances of Teague's case.

Further, a review of the voir dire examination of the jurors challenged by the defense reveals the presence of similar factors raising similar concerns about their ability to be impartial. Of the ten jurors challenged by the defense, two had friends or family involved in law enforcement; two had either been the victim of a crime or members of their family had been crime victims; four jurors or members of their family had been treated by psychiatrists; one recognized the name of a police officer involved in Teague's case; and one stated that she "didn't care for violence." Thus, a comparison of the responses given by those jurors excused by the prosecution and by the defense with their respective peremptory challenges reveals that they were exercised

by each party for the very same logical reasons--that is, to remove only those jurors whose backgrounds seemed to disclose facts suggesting the possibility or probability of partiality or the presence of preconceived ideas regarding key issues on trial. A close examination of the record thus discloses, contrary to the majority's conclusion, that counsel for both sides properly and legitimately exercised their peremptory challenges to remove those jurors which they determined could not be fair and impartial in evaluating the evidence and deciding the facts of Teague's case.

The majority has done nothing more than to advance a sociological theory not yet recommended, much less adopted by any Supreme Court in the history of the nation and now recognized by only 3 out of 50 States.[16] Further, the majority has failed to provide any sound, valid, or logical reasons for this court to depart from the Swain analysis when presented with a claim that the use of peremptory challenges to exclude all blacks from a petit jury violated the defendant's Sixth Amendment right to a jury trial. The free and unfettered exercise of the peremptory challenge in the context of the specific facts and circumstances of a particular case is "a necessary part of trial by jury," Swain, 380 U.S. at 219, and is essential to the selection of the fair and impartial petit jury guaranteed by the Sixth Amendment to the Constitution. The availability of the peremptory challenge "permits rejection for a real or imagined partiality that is less

16 In addition to California and Massachusets, the State of Florida has recognized that its State constitution prohibits the prosecutor's use of race as a basis for exercising peremptory challenges. See State v. Neil, 457 So.2d 481 (Fla. 1984).

easily designated or demonstrable. ... [T]he question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." Id. at 220-21. Thus, the Supreme Court in Swain clearly held:

> "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to an examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it."

Id. at 222. The majority's unwarranted and unsupported holding destroys the essence of the peremptory challenge, and "any system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." Pointer v. United States, 151 U.S. 396, 408 (1893). For the peremptory challenge "'is an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.'" Swain, 380 U.S. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)). Thus, the majority's ill-advised, and unsupported departure from the analysis set forth in Swain v. Alabama eviscerating the effectiveness of the peremptory challenge "must be condemned." Finally, although I am convinced that an examination of the basis for the exercise of peremptory challenges would ultimately frustrate the timely search for justice and

APPENDIX B

Pittsburgh Plate Glass Co., 404 U.S. at 1897, 92 S.Ct. at 402. The Board has chosen not to create an exception to section 8(d) for economic necessity. The Board's decision stems from its special understanding of the Act and of the complexities of industrial relations and, hence, warrants our deference. *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. at 236, 83 S.Ct. at 1156; *N.L.R.B. v. United Steelworkers*, 357 U.S. 357, 362-63, 78 S.Ct. 1268, 1271-72, 2 L.Ed.2d 1383 (1963). In refusing to recognize Manley's defense of economic necessity, the Board acted within its statutory authority.[8]

III

For the reasons stated above, the Board's petition for enforcement is

GRANTED.

UNITED STATES of America, ex rel. Frank TEAGUE, Petitioner-Appellant,

v.

Michael P. LANE, Director, Department of Corrections and Michael O'Leary, Warden, Stateville Correctional Center, Respondents-Appellees.

No. 84-2474.

United States Court of Appeals, Seventh Circuit.

Dec. 30, 1985

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division; William T. Hart, Judge.

Patricia Unsinn, Chicago, Ill., for petitioner-appellant.

Mark Rotert, Asst. Atty. Gen., Chicago, Ill., for respondents-appellees.

Before CUMMINGS, Chief Judge, and BAUER, WOOD, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK and RIPPLE, Circuit Judges.

ORDER

This case was argued on April 9, 1985 to a panel consisting of Judges Cudahy and Coffey, together with Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation.

Pursuant to Circuit Rule 16(e), the panel opinion in this case was circulated to all the judges of the court in regular active service. A majority of the judges in regular active service have voted to rehear this case *en banc*, the time of argument to be set at a date convenient to the court.

CUDAHY, Circuit Judge, dissenting.

This case involves the question whether the Constitution prohibits prosecutors from using their peremptory challenges to exclude potential jurors exclusively on the basis of race. The matter was originally heard by a panel consisting of Judge Coffey, Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation, and me. The panel opinion, which I wrote, vacated and remanded on the grounds that the exercise of peremptory challenges by the prosecutor in this case violated, at least prima facie, the defendant's Sixth Amend-

8. We find unconvincing Manley's argument that the Board's position contravenes the intent and purpose of the Act. Manley cites one case for example, in which the Board allowed an employer to raise a defense of economic necessity against a charged violation of section 8(d): *New York Mirror Division, Hearst Corp.*, 151 N.L.R.B. 834 (1965). Yet that case involved the employer's sale of an entire facility. Such an action is not mandatorily negotiable under § 8(d). The fact that the Board has recognized an economic necessity defense in such circumstances in no way precludes the Board from rejecting it in the context of the instant case. The Supreme Court too has allowed an employer to assert an economic necessity defense in regard to matters of permissive bargaining in the context of a partial plant closure, but in so doing the Court expressly distinguished that issue from matters of mandatory bargaining such as the wage rates involved here. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 675, 101 S.Ct. 2573, 2579, 69 L.Ed.2d 318 (1981).

ment right to an impartial jury. The panel opinion, together with a dissent by Judge Coffey, was then circulated under our Circuit Rule 16 to the full court, which voted to rehear the matter *en banc*. I shall briefly outline here the essential contents of the opinion of the panel majority to indicate why I believe that *en banc* review is unnecessary. Judge Peck has requested that I record his agreement with the views which follow.

Frank Teague, a black, was tried before a jury in an Illinois court and convicted of attempted murder and armed robbery. Each side had ten peremptory challenges and the state exercised all of its challenges to exclude black jurors. The defense also challenged one black, and there were no blacks on the resulting jury.

The defense moved for a mistrial, arguing that the state was denying Teague a trial by a jury of his peers by excluding potential jurors on the basis of race. These motions were denied. Although, as things now stand, a prosecutor need not defend his peremptory challenges, the state offered two rationales for its actions: that it was attempting to obtain a balance of men and women on the jury and that it had excused a number of young people. The Illinois Appellate Court noted that the record did not support the state's explanation but held that under existing law it could place no restriction on a prosecutor's use of his peremptory challenges.

The precise issue raised was whether a defendant's Sixth Amendment rights are violated when a prosecutor uses his peremptory challenges to exclude members of one race from a petit jury. Such a use is not a violation of the Equal Protection Clause of the Fourteenth Amendment, so long as the exclusion does not prevent members of a race from ever sitting on juries, "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or victim may be." *Swain v. Alabama*, 380 U.S. 202, 223, 85 S.Ct. 824, 837, 13 L.Ed.2d 759 (1965). *Swain* was clearly decided on equal protection grounds and, although the Court did not question the standing of the defendant Swain, the rights asserted and addressed by the Court were in large measure the rights of blacks who were prevented from serving as jurors. But the right to sit on a jury is quite distinct from the right of a defendant to be tried by a jury from which members of his race have not been systematically excluded.

The Fourteenth Amendment guarantees due process as well as equal protection, but at the time *Swain* was decided it was not yet settled which jury-trial rights were guaranteed by that amendment's due process clause. We now know that the Sixth Amendment applies fully to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); what has not been resolved is whether the Sixth Amendment guarantees the right to a jury from which eligible jurors have not been excluded because of their race. This question was raised but not decided in two recent cases in this circuit. *See United States v. Clark*, 737 F.2d 679 (7th Cir.1984) (facts of case failed to raise presumption of racial motivation); *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168 (7th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984) (habeas petitioner waived objection by failing to raise it in state court). Other circuits have split on the question: *compare Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir.1983), *and United States v. Childress*, 715 F.2d 1313 (8th Cir.1983) (no Sixth Amendment right), *with McCray v. Abrams*, 750 F.2d 1113 (2d Cir.1984), *and Booker v. Jabe*, 775 F.2d 762 (6th Cir.1985); and the Supreme Court has heard oral argument on this question in an appeal from a state supreme court, *Batson v. Kentucky*, — U.S. —, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985).

As Judge Peck and I have viewed it, the question presents a clash between two devices, the peremptory challenge and the requirement of representativeness in the jury pool, both of which are intended to secure an impartial jury and neither of which we wanted to see destroyed. For

the most part they do not conflict, but when they do one must give way partially so that neither will be destroyed.

The Sixth Amendment guarantees that the jury pool from which a jury is selected must contain a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The representativeness requirement does not extend directly to the petit jury—no defendant can demand a perfect cross-section on his jury—but the fact that there is not a direct connection does not mean that there is no connection at all. If the Sixth Amendment has implications for the jury pool, that can only be because it has some implication for the jury that actually sits at trial. In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court held that a six-person jury was constitutionally acceptable, noting that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." *Id.* at 100, 90 S.Ct. at 1906 (emphasis added). In *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), it held that a five-person jury was not, expressing concern about "the ability of juries truly to represent the community as membership decreases below six." *Id.* at 242, 98 S.Ct. at 1040. Although the Sixth Amendment does not guarantee a representative trial jury, it does appear to guarantee the *possibility* of a representative jury. In the absence of that possibility, the negative effect upon defendants who belong to the group excluded is not difficult to imagine; it will be especially severe where the group suffers from community prejudice. Judge Peck and I thought it beyond dispute, therefore, that the Sixth Amendment's protection lies in its requirement that the state cannot interfere with the possibility that the jury will be representative.

There is no constitutional right to peremptory challenges. *Swain*, 380 U.S. at 219, 85 L.Ed.2d at 835, but the peremptory challenge has a long history, serves an important function, and should not lightly be narrowed. The peremptory challenge allows each side to eliminate jurors whom it suspects, for reasons it cannot articulate or for reasons not reaching the level of cause, of being partial to the other side. With peremptory challenges, the resulting jury should be closer to the ideal of a body without sympathies for either side. And yet the peremptory challenge may conflict with the goal of securing to each defendant the possibility of a representative jury, for with enough peremptory challenges a prosecutor can, if he chooses, make sure that members of a minority group do not appear on any jury where their presence would be a hindrance to him.

Judge Peck and I therefore believed that the only option open to the court in these circumstances was to limit the peremptory challenge in some way. We did not believe that this mechanism for insuring jury impartiality would be destroyed if abuses of it were made subject to objection. We therefore suggested a limitation that we think would be the least intrusive while complying with the demands of the Sixth Amendment. Rather than reduce the number of peremptory challenges, as some have suggested, we sought to limit the prosecutor with a procedure that would screen out only cases of discriminatory abuse. Two circuits have placed such limits on the use of the peremptory challenge to avoid violating the Sixth Amendment. *See Booker v. Jabe*, *supra*, and *McCray v. Adams*, *supra*. A number of other circuits have done so as an exercise of their supervisory powers. *See United States v. Leslie*, 759 F.2d 366 (5th Cir.1985) (*en banc*); *United States v. Jackson*, 696 F.2d 578, 593 (8th Cir.1982), *cert. denied*, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). *See also United States v. McDaniels*, 379 F.Supp. 1243, 1249 (E.D.La.1974). State supreme courts have followed a similar route. *see State v. Neil*, 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

According the procedure adopted by these courts and suggested by Judge Peck and me, the defendant would have to raise a timely objection and make out a prima facie case by showing that the persons excluded were members of a cognizable and suspect group and that those challenged were more likely to have been challenged because of the group they belong to than because of any specific bias. Once the prima facie case was made, it would be up to the prosecutor to rebut it. The appropriate rebuttal would involve bias, of course, because bias is supposed to be the reason for the challenges in the first place. The prosecutor's rationale would not have to be one that would sustain a challenge for cause, but it would have to be both race-neutral and supported by the record. This procedure would not prevent the prosecutor from excluding two, or three, or four of a given race, but it would prevent him from either using *all* of his peremptories to exclude members of a race, or from using his peremptories to systematically exclude all members of a race. All of this would fall short of destroying the peremptory challenge. The prosecutor would be free to use his challenges as he chose, so long as he did not use them for the unpermissible purpose of systematically excluding blacks, or members of one cognizable group, from the petit jury.

For these reasons, which were set forth at length in the proposed panel opinion, I think en banc review unnecessary, and I therefore respectfully dissent from the order directing rehearing en banc.

STATE OF MINNESOTA, by its Commissioner of Human Services, Leonard W. LEVINE, Petitioner,

v.

Margaret HECKLER, Secretary, and United States Department of Health & Human Services, Respondents.

No. 85-1001.

United States Court of Appeals, Eighth Circuit.

Submitted June 12, 1985.

Decided Dec. 12, 1985.

Rehearing Denied Jan. 6, 1986.

Secretary of Department of Health and Human Services disapproved two policies contained in Minnesota's proposed amendments to its medicaid plan. Minnesota appealed. The Court of Appeals, Fagg, Circuit Judge, held that: (1) Secretary's failure to comply with 90-day requirement did not prejudice Minnesota, (2) Secretary acted within scope of her authority in disapproving Minnesota's 15-day policy allowing recipient to remain eligible to receive medicaid benefits until 15 days after notification by local medicaid agency, and (3) termination of policy did not violate statutory provision which allows participating states that exercised option to retain eligibility standards in effect on January 1, 1972.

Affirmed.

1. Social Security and Public Welfare ⇐241.60

Limitation period of 90 days for approving state's amendments to medicaid plan is procedural rather than substantive rule, and failure to follow procedural rule will not invalidate agency action in absence of prejudice to complaining party. Social Security Act, § 1116(a)(1), as amended, 42 U.S.C.A. § 1316(a)(1).

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2474

FRANK TEAGUE,

Petitioner-Appellant,

v.

MICHAEL LANE, Director,
Department of Corrections,
and MICHAEL O'LEARY, Warden,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1934—William T. Hart, *Judge*.

ARGUED OCTOBER 23, 1986—DECIDED MAY 11, 1987*

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, CUDAHY, POSNER, COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges*. The original panel decision in this case reversing the order of the district court that denied the appellant Frank Teague's petition for a writ of habeas corpus was vacated, *United States ex rel. Teague v. Lane*, 779 F.2d

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* The original opinion in this case with Judge John L. Coffey dissenting was circulated to the active members of the court pursuant to Circuit Rule 16(e). A Majority of the court voted to rehear the case en banc.

1332 (7th Cir. 1985), and the case set for rehearing en banc pursuant to Circuit Rule 16(e).[1] We now affirm the order of the district court denying Teague's petition for a writ of habeas corpus.

I

COFFEY, *Circuit Judge*. Teague, a black man, was convicted after a jury trial in an Illinois court for attempted murder and armed robbery.[2] In the process of selecting the *Teague* jury, the prosecution in the exercise of its peremptory challenges excluded ten black jurors. In the exercise of the defendant's peremptory challenges, the only other black on the juror list was removed. The defendant initially challenged the State's use of its peremptory challenges after the state had exercised six of its peremptories and again after jury selection was completed claiming that the State's exclusion of all blacks from the jury deprived him of his right to "trial by a jury of his peers." The trial court rejected the defendant's argument that he was deprived of a "trial by his peers" stating that "the jury appears to be a fair jury" and the Illinois Court of Appeals affirmed the defendant's conviction explaining that no restriction could be placed on a prosecutor's exercise of peremptory challenges in the absence of a demonstration that blacks had been systematically excluded under the *Swain v. Alabama* test. *People v. Teague*, 108 Ill. App. 3d 891 (1st Dist. 1982). The Illinois Supreme Court denied Teague's Petition for Leave to Appeal, 93 Ill. 2d 547 (1983), and the United States Supreme Court denied *certiorari*. 464 U.S. 867 (1983). Teague then filed a petition for a writ of habeas corpus in the federal district court. The district court denied Teague's petition for a writ of habeas corpus explaining that Teague's claim that his constitutional rights were violated by the prosecution's use of its peremptories was "foreclosed by *Swain* and the Seventh Circuit's recent decisions in *United States v. Clark* [737 F.2d 679 (7th Cir. 1984)], and *United States ex rel. Palmer v. DeRobertis*, [738 F.2d 168 (7th Cir. 1984)]."

In *Batson*, 106 S. Ct. 1712 (1986), the Supreme Court decided that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[3] The *Batson* decision expressly overruled *Swain v. Alabama*, 380 U.S. 202 (1965), but did not address the sixth amendment question concerning the right to a trial by an impartial jury. In *Allen v. Hardy*, 106 S. Ct. 2878 (1986), the Supreme Court held that *Batson* was not to be applied "retroactively [to cases such as Teague's] on collateral review of convictions that became final before our opinion [in *Batson*] was announced."[4] However, even

[1] The rehearing en banc was postponed until after the United States Supreme Court had decided *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), which was pending before the Supreme Court when we vacated the original panel decision in *Teague*.

[2] Teague was charged with attempted murder, aggravated battery, and armed robbery. Section 115-4(e) of the Illinois Code of Criminal Procedure provides in pertinent part:

> "A defendant . . . shall be allowed 20 peremptory challenges on a capital case, 10 in a case on which the punishment may be imprisonment in the penitentiary [including attempted murder and armed robbery], and 5 in all other cases. . . . The State shall be allowed the same number of peremptory challenges as all defendants."

Ill. Rev. Stat. Ch. 38, 115-4(e).

[3] The Equal Protection Clause of the Fourteenth Amendment provides: "[No state shall] deny to any person within its jurisdiction the equal protection of the laws."

[4] Teague argues that we should determine the "finality" of his appeal as of the date the Supreme Court denied *certiorari* in *McCray v. Abrams*, 103 S. Ct. 2438 (1983). However *Allen* makes clear that "finality" for purposes of the retroactive application of *Batson* is to be determined as of the date *Batson* was decided and Teague has not persuaded us that *Allen* means anything other than what it expressly states.

if *Batson* were to be applied retroactively to Teague's case, it would not control this court's disposition of Teague's petition for habeas corpus, since Teague challenges his conviction on sixth amendment[5] grounds and does not raise an equal protection claim subject to the holdings in *Batson* and *Allen*.[6]

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[5] The sixth amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[6] Counsel for Teague asserted at oral argument that this court could decide Teague's appeal on Equal Protection grounds under *Swain v. Alabama* if we refused to apply *Batson* retroactively to Teague's appeal. Although we are persuaded by the State's argument that Teague did not specifically raise a *Swain v. Alabama* claim in the state court and therefore he is procedurally barred from doing so under *Wainwright v. Sykes*, 433 U.S. 72 (1977), we reject Teague's Equal Protection argument in substance as well. Teague did not claim in state court nor in the district court that the prosecution had engaged in the systematic exclusion of blacks from petit juries in case after case. Thus, Teague has failed to meet his initial burden under the *Swain v. Alabama* analysis. Teague also argues, based on *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), that where the prosecutor volunteers an explanation for the use of his peremptory challenges, *Swain* does not preclude the court from examining the stated reasons to determine the legitimacy of the prosecutor's motive in exercising his peremptories. This court has refused to read *Swain* so broadly. In *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984), we noted that absent evidence that established a pattern of systematic exclusion of blacks "larger than the single case" there was no basis for an Equal Protection challenge even if it could be demonstrated that the prosecution had exercised its peremptories on the basis of race. Accordingly, even if Teague's Equal Protection claim based on *Swain* was not barred under *Wainwright v. Sykes*, we would reject it on the basis of our prior refusal to read *Swain* as broadly as the Ninth Circuit has in *Weathersby*.

II

In *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), the United States Supreme Court held that "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 1719. The *Batson* decision adopted a new analysis for establishing whether the prosecution's use of its peremptory challenges had violated the Equal Protection Clause and "reject[ed] this [the *Swain v. Alabama*] evidentiary formulation [for establishing Equal Protection violation] as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* Under *Batson*,

> "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' *Avery v. Georgia*, *supra*, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Id. at 1722-23. The *Swain* court refused to adopt a rule that would allow a criminal defendant to establish an Equal Protection violation simply by demonstrating that in his particular case, the prosecution had used its peremptories to remove all blacks from the jury actually empanelled to try the defendant:

> "In the light of the purpose of a peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case."

380 U.S. at 223. Instead, *Swain* required that a defendant seeking to establish an Equal Protection violation must demonstrate that the prosecutor systematically used his peremptories to exclude Blacks or other suspect classes from petit juries in case after case, and not just that all Blacks were peremptorily removed from the jury in the particular defendant's case:

> "We have decided that it is permissible to insulate from the inquiry the removal of Negroes of a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, a particular defendant involved and the particular crime charged. But when the prosecutor in a county, *in case after case*, whatever the circumstances, whatever the crime and *whoever the defendant or the victim may be*, is responsible for the removal of Negroes who have been selected as qualifed jurors and the jury commissioners and who survive challenges for cause, with the result that *no Negroes ever serve on petit juries*, the Fourteenth Amendment claim takes on added significance."

Id. (emphasis added).

Batson rejected this approach as a requirement for establishing an Equal Protection violation based on the prosecutor's use of peremptory challenges. The court explained that *Swain*: "Placed on defendants the crippling burden of proof" and thus "prosecutors peremptory challenges are now arguably immune of constitutional scrutiny." 106 S. Ct. at 1720-21 (footnote omitted). Accordingly, the court in *Batson* rejected the *Swain* court's "evidentiary formulation [for establishing that a prosecutor used its peremptories for a constitutionally impermissible purpose] as inconsistent with standards that have developed since *Swain* for assessing a prima facia case under the Equal Protection Clause." *Id.* at 1719.

The *Batson* decision makes clear that the court decided the case on equal protection grounds and declined to rule on Batson's claimed sixth amendment violation:

> "We agree with the State that resolution of the petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments."

Batson, 106 S. Ct. at 1716 n. 4.[7] Although in *Batson* a criminal defendant was allowed to establish a violation of

[7] The concurring and dissenting judges apparently read footnote 4 in *Batson* as implying that the Supreme Court decided *Batson* on Equal Protection grounds even though the petitioner had never raised an Equal Protection claim. The petitioner in *Batson*, unlike Teague, objected to the prosecutor's use of peremptory challenges on Equal Protection grounds in the state trial court, and thus, there was a basis in the record for deciding *Batson* on Equal Pro-

(Footnote continued on following page)

the equal protection clause by alleging, as Teague has, that the prosecution exercised its peremptories solely on the basis of a prospective juror's race, the Supreme Court's *Allen v. Hardy*, 106 S. Ct. 2878 (1986) decision, precludes an application of the *Batson* rule to Teague's appeal. In *Allen*, decided just two months after *Batson*, the court held that *Batson* did not apply "retroactively on collateral review of convictions that became final before our opinion [in *Batson*] was announced." The court went on to explain that:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for *certiorari* had elapsed before our decision in *Batson v. Kentucky*."

Id. at n. 1. Teague's appeals were rejected by the Illinois appellate courts and his petition for writ of *certiorari* from the United States Supreme Court was denied on October 3, 1983. *See Teague v. Illinois*, 464 U.S. 867 (1983). Thus, Teague's case is "final" for purposes of applying *Batson* retroactively and therefore our review of Teague's appeal is limited solely to his sixth amendment argument, an argument the Supreme Court declined to consider in *Batson*.

Essentially, Teague relies on *Smith v. Texas*, 311 U.S. 128 (1940), and subsequent Supreme Court decisions, to

[7] *continued*
tection grounds. In contrast, since Teague based his objection to the prosecutor's use of peremptories on the fair cross-section requirement of the Sixth Amendment there is no basis in the record for deciding his appeal on Equal Protection grounds. Teague's subsequent arguments in the state courts did not address Equal Protection and thus Teague's appeal is clearly distinguishable from *Batson*. Teague asserted an Equal Protection argument more than one year after his initial argument before this court pursuant to our request that the parties brief the effect on Teague's appeal of the Supreme Court's decision in *Batson*. Unfortunately for Teague, the Supreme Court's decision in *Allen* makes clear that Teague is not entitled, any more than the petitioner in *Allen*, to raise an Equal Protection claim at this stage in the proceedings.

argue that the "fair cross section of the community" requirement as found in the sixth amendment is applicable to jury pools from which the petit jury is selected to reflect the trial community and must likewise be applied to the jury ultimately empanelled (petit jury) for trial. Teague asserts that the use of peremptory challenges to exclude certain classes of a community from the petit jury in effect undermines the Supreme Court's fair cross-section requirement in the jury pool and contravenes the very idea of a jury composed of the peers and equals of the person on trial. Teague acknowledges that the Supreme Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975), refused to extend the fair cross-section requirement to the petit jury, but maintains that two Supreme Court cases, *Williams v. Florida*, 399 U.S. 78 (1970), and *Ballew v. Georgia*, 435 U.S. 223 (1978), addressing the small number of jurors on petit juries support his argument that the sixth amendment requires the fair cross section principle be applied to petit juries as well as the jury pools they are drawn from. Teague asserts that *Williams v. Florida*, stands for the proposition that the sixth amendment requires that the petit jury must be selected pursuant to procedures that provide a "fair possibility" of obtaining a petit jury representative of the community. Accordingly, Teague reads the Supreme Court's determination in *Ballew v. Georgia*, that a trial by jury of less than six persons[8] violates the sixth amendment because it in effect mathematically decreases the opportunity for meaningful representation of a cross section of the community as supporting his position. Teague interprets *Ballew* as meaning that the use of peremptory challenges to remove prospective jurors on the basis of race alone violates the sixth amendment since exercising one's peremptory challenges on the basis of race alone decreases the "opportunity" for minor-

[8] The following states allow trial by a jury of less than twelve persons in felony cases: Arizona, Connecticut, Florida, Louisiana, Massachusetts, Nebraska, and Utah. *State Court Organization 1980*, National Center for State Courts (1980).

ity representation on the petit jury and thereby prevents the jury from reflecting a fair cross-section of the community. Therefore, according to Teague, the use of peremptories to remove prospective jurors on the basis of race alone violates the sixth amendment since the petit jury ultimately empanelled does not reflect a fair cross-section of the community.

Teague's argument that the petit jury should be considered the same as the jury pool for purposes of the fair cross-section requirement rests on the mistaken assumption that the word "impartial" as used in the sixth amendment requires that the petit jury reflect a cross-section of the community from which it is drawn. Teague has not argued to this court nor any of the other courts that have heard his case, that the jury that tried him was not impartial. Rather, he asserts only that the jury in his case did not represent a cross-section of the community wherein he was tried. We refuse to break new ground and read such a requirement into the sixth amendment for the decisions of the United States Supreme Court to date fail to support such an argument. Since we agree with the United States Supreme Court and not with Teague's theory that the sixth amendment requires that the petit jury be identical to the community where the jury is drawn from, we reject Teague's assertion that the prosecutor's use of his peremptories to remove ten prospective black jurors from the petit jury violated his sixth amendment right to trial by an impartial jury.

The sixth amendment provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The United States Supreme Court has consistently interpreted the sixth amendment right to trial by an impartial jury to require a jury that is "indifferent" and that the petit jury be selected from a "fair cross-section of the community:" "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," *Irwin v. Dowd*, 366 U.S. 717, 723 (1961), and "A fair possibility for obtaining a jury constituting a representative cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975). In *Taylor*, the court explained:

> "The unmistakable import of this court's opinions, at least since 1940, *Smith v. Texas*, *supra*, and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. Recent federal legislation governing jury selection within the federal court system has a similar thrust. Shortly prior to this court's decision in *Duncan v. Louisiana*, *supra*, the Federal Jury Selection and Service Act of 1968 was enacted. In that Act, Congress stated 'The policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.' 28 U.S.C. § 1861. In that Act, Congress also established the machinery by which the stated policy was to be implemented. 28 U.S.C. §§ 1862 through 1866. Passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a cross section of the community was fundamental to the American system of justice. Debate on the floors of the House and Senate on the Act invoked the Sixth Amendment, the Constitution generally, and prior decisions of this Court in support of the Act."

419 U.S. at 529-31 (footnotes omitted). Although the Supreme Court has interpreted the sixth amendment to require that the jury in a criminal trial be chosen from a jury pool that represents a fair cross-section of the com-

munity, it has never interpreted the explicit command of the sixth amendment that the petit jury itself be "impartial" to require that the petit jury actually represent each and every element of the community from which it is selected. Instead, the fair cross-section requirement, like all constitutionally mandated characteristics of the jury, has its origins in the purposes the Supreme Court has interpreted the sixth amendment right to jury trial to serve:

> "The purpose of the jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system."

Taylor, 419 U.S. at 531 (citation omitted). Contrary to Teague's assertion that the Supreme Court decisions in *Williams* and *Apodaca v. Oregon*, 406 U.S. 404 (1972), require us to apply the fair cross-section requirement to the petit jury, those decisions, as well as the decisions in *Ballew* and *Burch v. Louisiana*, 441 U.S. 130 (1979), require only that the jury selection process provide for the "possibility" that the jury empanelled reflect a fair cross-section of the community. The decisions of the Supreme Court make clear that absent a pattern of systematic exclusion of a particular class from the petit jury, no constitutional wrong has occurred.[9] As the court explained in *Apodaca*:

[9] And the cases make clear that when a systematic pattern of exclusion is established, the Equal Protection Clause and not the sixth amendment is the constitutional provision implicated.

> "There are two flaws in this argument [that the fair cross-section requirement requires a unanimous verdict]. One is petitioners' assumption that every distinct voice in the community has a right to be represented on every jury and a right to prevent conviction of a defendant in any case. All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded. See *Swain v. Alabama*, 380 U.S. 202, 208-209, 85 S.Ct. 824, 829, 13 L.Ed.2d 759 (1965); *Cassell v. Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 631, 94 L.Ed. 839 (1950); *Akins v. Texas*, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279 89 L.Ed. 1692 (1945); *Ruthenberg v. United States*, 245 U.S. 480, 28 S.Ct. 168, 62 L.Ed. 414 (1918). No group, in short, has the right to participate in the overall legal processes by which criminal guilt and innocence are determined."

406 U.S. at 413.

However, the Supreme Court decisions distinguish between the requirement that jury pools reflect a fair cross-section of the community and the requirement that a petit jury be impartial:

> "Trial by jury presupposes a jury drawn from a pool broadly representative of the community *as well as* impartial in *a specific case*."

Thiel v. Southern Pacific Company, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (adopted by Court in *Taylor*, 419 U.S. at 531) (emphasis added). Indeed, the Supreme Court has gone so far as to state:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a *particular jury* is not enough."

Fay v. New York, 332 U.S. 261, 285 (1947) (emphasis added). And the court in *Taylor* read its prior decisions concerning jury composition and the fair cross-section requirement as specifically limiting the fair cross-section requirement to the jury pool from which the petit jury was ultimately empanelled:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition."

419 U.S. at 538 (citation omitted).

Thus, the decisions of the United States Supreme Court to date make clear that the fair cross-section requirement of the sixth amendment does not apply to the petit jury itself, and we are not persuaded that sufficient reasons or facts presented to us in this record give reason for us to expand the scope of the Supreme Court's holdings in Teague's case. Several factors mandate against such an unwarranted expansion. First, the process of random selection may result in the under—or over representation of particular groups on a venire and the removal of jurors for cause likewise may result in the under—or over representation of a particular group on a petit jury in a given case. Second, the requirement that a specific group be represented on any given petit jury would necessarily entail tremendous administrative problems in the empanelling of a jury; in each case, the trial court would be called upon to expend a greater amount of time in order to ascertain the race, nationality, religion, occupation, and other characteristics of members of the community in relation to the facts and circumstances of the case on trial and determine which groups of the population were relevant, and thus essential to the composition of each and every petit jury. As we noted in *Clark*, "[t]he potential for stretching out criminal trials that are already too long, by making

the voir dire a Title VII proceeding in miniature" is one of several practical considerations against requiring that the petit jury represent a cross section of the community. 737 F.2d at 682. *See also* Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 347-48 n.47 (1982). The Supreme Court acknowledged these problems in a footnote in *Batson*:

> "Similarly, though the Sixth Amendment guarantees that a petit jury will be selected from a pool of names representing a cross-section of the community, *Taylor v. Louisiana*, 419 U.S. 522 (1975), we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,' *Id.* at 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such a possibility is illustrated by the court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U.S. 78, 102-103 (1970)."

Batson, 106 S. Ct. at 1717 n.6. In *Lockhart v. McCree*, 106 S. Ct. 1758 (1986), the Supreme Court further explained its reasons for not applying the fair cross-section requirement to the petit jury:

> "we do not believe that the fair cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed.2d 690 (1975) ('[W]e impose no requirement that petit juries actually chosen

must mirror the community and reflect the various distinctive groups in the population'); cf. *Batson v. Kentucky*, ___ U.S. ___, ___, n.4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d ___ (1986) (expressly declining to address 'fair cross-section' challenge to discriminatory use of peremptory challenges). The limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury, see id., at ___, n. 6, 106 S.Ct., at 1717, no. 6, a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. See *United States v. Childress*, 715 F.2d 1313 (CA8 1983) (en banc), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Pope v. United States*, 372 F.2d 710, 725 (CA8 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn"), vacated on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension."

Further, although we believe the fair cross-section requirement aids in the selection of an impartial jury, the requirement itself does not guarantee an impartial jury—and would not even if applied to the petit jury. Thus, the parties must have peremptory challenges available to them so that they might have the opportunity to eliminate any prospective juror whom they believe may not be impartial even though the jury was drawn from a pool representing a fair cross-section of the community. Further, peremptories help to ensure impartiality by compensating for the limitations inherent in the jury system itself; there is no guarantee that any group of twelve (or six) empanelled to try a case will reflect all attitudes, beliefs, etc. in a community. To prevent the unfairness of a trial heard by

a panel of jurors slanted toward one view or another should chance so provide (i.e., random selection of the pool), the parties are allowed to exercise the right of the peremptory challenge in order that they might be able to select a jury that they believe will be impartial while serving their individual best interests in their sincere attempt to achieve justice. Peremptory challenges are consistent with the fair cross-section requirement to insure that the jury that ultimately tries the case will be impartial.

Moreover, many of the circuits that have addressed the issue of whether the fair cross section requirement of the sixth amendment mandates that the petit jury mirror the community from which it is drawn have refused to extend the fair cross section requirement to the petit jury. *See United States v. Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 443 (1984); *Pregean v. Blackburn*, 743 F.2d 1091, 1103-04 (5th Cir. 1984); *United States v. Witfield*, 715 F.2d 145, 146-47 (4th Cir. 1983); *Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984). *Cf. Willis v. Zant*, 720 F.2d 1212, 1219 n. 14 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3546 (1984).

Finally, extending the fair cross-section requirement to the petit jury as Teague suggests would effectively undermine the use of peremptory challenges in criminal cases. We refuse to expand or enlarge the parameters of the Supreme Court decisions addressing the fair cross section requirement, for doing so would seriously disrupt the trial process as it currently exists, especially in view of the Supreme Court's explicit statements that such an expansion is not justified. *See Taylor; Fay*. In *Swain*, the court outlined the history of the peremptory challenge from the days of the common law of England to the law as it has developed in the United States and concluded that:

"[T]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of

> trial by jury. . . . The [peremptory] challenge is 'one of the most important of the rights secured to the accused.' "

Swain, 380 at 219 (quoting *Pointer v. United States*, 151 U.S. 396 (1894)). But the right of the peremptory challenge is not limited to the accused. The *Swain* court recognized that: "The view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held.' " 380 U.S. at 220 (quoting *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887)).

The *Swain* court described the function of the peremptory challenge as

> "Not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."

380 U.S. at 219-20. The court further noted, "The essential nature of the peremptory challenges is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220. " '[I]t is, as *Blackstone* says, an arbitrary and capricious right, and it must be exercised with full freedom or it fails of its full purpose.' " *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

Teague's argument that the fair cross-section requirement of the sixth amendment extends to the petit jury and restricts the use of peremptory challenges ignores the fact that the peremptory challenge is an essential tool not only to the prosecutor, but to the defendant as well, and their combined effort to obtain a fair and impartial petit

jury in their search for the truth of the facts presented and ultimate justice for all. Any requirement that would interfere with the use of peremptory challenges would harm the defendant by disarming the defendant or his attorney of the ability to rely on intuitive feelings or past trial experience in selecting the jury that will pass judgment on the defendant. The

> "system of peremptory [challenges]—challenges without cause, without explanation, and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."

Swain, 380 U.S. at 211-12. And the peremptory challenge " 'is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.' " *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)). The sixth amendment literally provides, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury" (emphasis added). "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of *impartial*, *'indifferent'* jurors." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (emphasis added). Although the sixth amendment provides protection only for the defendant, if we believe that the American system of justice is based on the premise that a jury trial is a search for the truth, we must acknowledge that both the prosecution and defendant are entitled to an impartial jury. Thus, the courts have recognized that "The State also enjoys the right to an impartial jury." *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

> "The system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against the prosecution. Between him and the State, the scales are to be evenly held.' "

Swain, 380 at 220 (quoting *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887)); *Spinkellink*, 578 F.2d at 596.

The peremptory challenge does not conflict with the right of a defendant to have his jury drawn from a representative jury pool. Both the peremptory challenge and the requirement of the representative venire advanced the constitutional goal of obtaining a fair and impartial jury in the undying quest and search for justice. And it may be that the requirement that a a jury venire or pool represent a fair cross-section of the community in fact increases the necessity of employing peremptories to obtain an impartial petit jury.

> "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross section of a heterogeneous society."

Swain, 380 U.S. at 218. The *Swain* court acknowledged that the "peremptory challenge is a necessary part of trial by jury." *Id.* The court recognized that the challenge for cause alone is insufficient to assure the impartiality of a jury in a given case.

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrable."

Id. at 220. Thus, the courts have found it proper to exercise a peremptory challenge to exclude a juror who could not be dismissed for cause in the context of a given trial. *See Dobbert v. Strickland*, 718 F.2d 1518, 1524-25 (11th Cirl 1983); *Jordan v. Watkins*, 681 F.2d 1067, 1070 (5th Cir. 1982).

Finally, Teague's argument that *Williams* and *Ballew* require us to extend the fair cross-section requirement to the petit jury is likewise unpersuasive. Although *Williams* and *Ballew* pertain specifically to the composition of petit juries, when viewed in the proper context, they militate against Teague's assertion that the petit jury must contain a cross-section of the community: the six-person Florida jury approved in *Williams* certainly does not guarantee that the jury will consist of a representative cross-section of the community anymore than a 12-person jury. The Supreme Court in *Williams* stated:

> "Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden . . . the concern that the cross section will be significantly diminished if the jury is decreased in size from 12 to 6 seems an unrealistic one."

399 U.S. at 102. The court nevertheless recognized in *Ballew*, "The opportunity for meaningful and appropriate representation does decrease with the size of the panels." 435 U.S. at 237. Thus, it can hardly be doubted that the mathematical probability of obtaining a representative cross-section of the community is reduced when a jury is chosen consisting of six rather than 12 jurors. Notwithstanding the court's recognition in *Ballew* that a five-person jury inhibits the goal of meaningful and appropriate representation on the petit jury, the court in *Ballew* declined to retreat from its holding in *Williams*. The Supreme Court thus recognized that merely decreasing the possibility of obtaining a fair cross-section of the community on the petit jury does not violate the sixth amendment right to a trial by an impartial jury. Further, the record is barren of any proof or testimony establishing community prejudice towards Teague.

The free and unrestrained exercise of peremptory challenges does not eliminate the *possibility* of obtaining a truly representative trial jury and thus does not violate the sixth amendment right to trial by an impartial jury. *See Taylor*, 419 U.S. at 529 (sixth amendment requires "[a] fair possibility for obtaining a jury constituting a representative cross section of the community"). So long as the jury pool contains a fair cross-section of the com-

munity, the possibility of obtaining a representative trial jury remains regardless of how either party exercises its peremptory challenges. Since the sixth amendment requires only that a jury be impartial, we refuse to extend the fair cross-section requirement to require that the petit jury trying a criminal defendant reflect a fair cross-section of the community wherein the trial takes place. Requiring the petit jury to mirror the community will effectively undermine the value of the peremptory challenge without appreciably increasing the ability of the defendant or the prosecution to insure that the jury ultimately empanelled is impartial as required by the sixth amendment—all at the expense of the American jury system.

III

CONCLUSION

The sixth amendment provides the defendant in a criminal proceeding with the right to a trial by an impartial jury. The Supreme Court has determined that the right to trial by an impartial jury requires that the jury pool from which the petit jury is selected reflect a fair cross-section of the community so as to make possible and probable a petit jury representative of the community in which the defendant is tried. The Supreme Court has made clear, however, that the sixth amendment does not provide the criminal defendant with the right to a petit jury of any particular composition. *Taylor v. Louisiana*, 419 U.S. 522 (1975). Since we are not persuaded by the defendant's argument nor the realities of trial that a petit jury that mirrors the community from which it is drawn guarantees an impartial jury, we are not willing to interpret the sixth amendment as prescribing limits on the prosecutor's (or defendant's) exercise of peremptory challenges. We are confident that all jurors, black, white, or any other race, creed or color, upon the taking of their oath are equally capable of performing their task impartially. To hold that the sixth amendment limits the use of peremptory challenges would undermine the use of

peremptory challenges and impair the function of the jury in criminal trials without any demonstrable improvement in the impartiality of juries. Accordingly, we affirm the district court's order denying Teague's petition for a writ of habeas corpus.

RIPPLE, *Circuit Judge*, concurring. I concur in the judgment of the court.

In my view, as Judge Cudahy points out in his dissent, Mr. Teague may properly assert an equal protection claim in this court under the unique circumstances presented here. The Supreme Court, in *Batson v. Kentucky*, 106 S. Ct. 1712, 1716 n.4 (1986), refused to hold that the petitioner was procedurally barred from obtaining relief on the basis of the equal protection clause even though he had not raised an equal protection claim. I agree with Judge Cudahy that "[i]f one has no obligation to argue to the Supreme Court itself that it overrule one of its own cases, one surely need not argue to a district court that a Supreme Court case is wrong." Dissent at 3 (Cudahy, J.).

Although the equal protection claim is properly before us under the Supreme Court's ruling in *Batson*, that Court's subsequent holding in *Allen v. Hardy*, 106 S. Ct. 2878 (1986), controls our disposition of that claim. In *Allen*, the Supreme Court held that its holding in *Batson* should not be applied retroactively to cases on collateral review of convictions that became final before the *Batson* opinion. 106 S. Ct. at 2880.

I do not believe that the sixth amendment affords Mr. Teague a basis for relief independent from the equal protection analysis set forth in *Batson*. In the period between *Swain v. Alabama*, 380 U.S. 202 (1965), and *Batson*, the sixth amendment analysis was, I respectfully suggest, simply an elliptical way for the lower courts to avoid the precedential effect of *Swain*. *See, e.g., McCray v. Abrams*,

750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986). Indeed, in *Batson* itself, the Supreme Court seemed to acknowledge that the sixth amendment argument had played this role. 106 S. Ct. at 1716 n.4. Further, in *Batson*, the Court deliberately noted that application of sixth amendment principles to the petit jury situation would indeed be difficult. *Id.* at 1716 n.6.

Moreover, in deciding that the rule in *Batson* was not retroactive for cases on collateral review, the Supreme Court quite pointedly did not distinguish between equal protection and sixth amendment policy concerns when discussing *Batson*'s theoretical underpinnings:

> By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed "to serve multiple ends," only the first of which may have some impact on truthfinding.

Allen, 106 S. Ct. at 2880 (citations omitted). Nor can we avoid noting that, in disposing of two cases after its decision in *Batson* where the lower courts had granted relief to a state prisoner on sixth amendment grounds, the Supreme Court vacated the judgments and required reconsideration in light of *Batson* and its non-retroactivity rule.[1] If the sixth amendment analysis of those courts were worthy of independent review, there was ample opportunity to undertake the inquiry or to let the judgments of the lower

[1] *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker*, 106 S. Ct. 3289, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 910 (1987); *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986).

courts stand. Under these circumstances, I find the subsequent denial of certiorari in *Michigan v. Booker*, 107 S. Ct. 910 (1987), when the Sixth Circuit failed to apply *Batson* and *Allen*, worthy of little weight in our determination. In my view, therefore, the court should not address Mr. Teague's sixth amendment formulation of the equal protection claim he is barred from making because of the non-retroactive application of *Batson*.

CUDAHY, *Circuit Judge*, with whom CUMMINGS, *Circuit Judge*, concurs, dissenting:

This case was heard originally by a panel consisting of Judge John W. Peck of the Sixth Circuit, Judge Coffey and me. I wrote an opinion for the majority finding that Teague had established at least a prima facie case of a violation of his constitutional rights. Judge Coffey dissented. The opinion was circulated to the active members of the court under Rule 16(e), and the court voted to hear the case *in banc*. I dissented from the order setting the case *in banc*; the order, together with my dissent (which is a much-condensed version of the original panel opinion), appears at 779 F.2d 1332 (7th Cir. 1985). I rely on that dissent as a statement of my position on the merits here. After that order but before the *in banc* court heard oral argument, the Supreme Court decided *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), which, by overruling *Swain v. Alabama*, 380 U.S. 202 (1965), determined the merits of the underlying issue favorably to the position of the original panel majority.

I.

At the outset, I find the majority's procedural analysis far-fetched and overreaching, although it is unclear how

much of this really matters in the end. For example, the majority asserts that it is "persuaded by the State's argument that Teague did not specifically raise a *Swain v. Alabama* claim in the district court and therefore he is procedurally barred from doing so under *Wainwright v. Sykes*, 433 U.S. 72 (1977)." *Supra* p. 4 n.6. Presumably the majority also claims a failure to raise an equal protection claim in the state courts (which would be more relevant to *Wainwright v. Sykes*). In any event, the contention that Teague has waived his equal protection claim by failing to raise it in any of the courts prior to this one (state or federal) where the peremptory challenge issue has been argued will not stand analysis.

The short answer to these waiver arguments is that the Supreme Court itself in *Batson v. Kentucky* heard argument from the petitioner, Batson, which was directed solely to the Sixth Amendment point (and included the Fourteenth Amendment only to the extent that that amendment applied the Sixth Amendment to the states and not for equal protection purposes). The Court noted that:

> [P]etitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross-section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record.

106 S.Ct. at 1716 n.4.

Chief Justice Burger's dissent in *Batson* makes a major point of Batson's failure to raise an equal protection claim either in the state courts or in the Supreme Court:

> In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment.
>
> . . .
>
> Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here.

106 S.Ct. at 1731 (Burger, C.J., dissenting). The Supreme Court in *Batson*, of course, ignored these arguments and so should we here. *Batson* itself is thus on all fours procedurally with *Teague*. If one has no obligation to argue to the Supreme Court itself that it overrule one of its own cases, one surely need not argue to a district court that a Supreme Court case is wrong. In *Batson* the State of Kentucky contended that an equal protection claim was being made and that *Swain* controlled. Whether or not Teague has made equal protection an issue in the Illinois courts or in the district court (and the extent to which he has is perhaps debatable),[1] he was answered at every level by the state's contention that an equal protection claim was being made and *Swain* controlled. Having itself relied upon *Swain*, the state is estopped from arguing that equal protection was not properly raised.[2]

---

[1] Teague contends that he made a *Swain*-based argument in the district court and in this court, citing *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984). This provides an additional answer to the waiver argument.

[2] *Wainwright v. Sykes*, 433 U.S. 72 (1977), does not help the state here because, whether or not Teague raised the equal protection issue in the Illinois courts, those courts rejected Teague's claim on its equal protection merits. *See Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979); *United States ex rel. Ross v. Franzen*, 688 F.2d 1181, 1183 (7th Cir. 1982). The Illinois Appellate Court rejected Teague's argument because he ostensibly failed to demonstrate that blacks had been systematically precluded from jury service, as required by *Swain v. Alabama*. *People v. Teague*, 108 Ill. App. 3d 891, 895-96, 439 N.E.2d 1066, 1070 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983). Since the state court denied Teague relief on the ground that *Swain* controlled the result, we could

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I thus conclude that there is no barrier based on waiver, in the prior history of this litigation or in his arguments made here, to Teague's relying on *Batson* before this court. Teague's opponents in all the courts before this one have relied on *Swain* to defeat Teague's claim. Now that *Batson* has trumped *Swain*, there can be no principled objection to Teague's present reliance on *Batson*.

This still leaves us, of course, with the problem of *Batson*'s non-retroactivity under *Allen v. Hardy*, 106 S.Ct. 2878 (1986). At least *arguendo*, I would agree with the majority that Teague's claim must be sustainable on Sixth Amendment grounds in order to avoid the *Batson* non-retroactivity hurdle erected in *Allen*.

Teague's case is thus entirely parallel to *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985). There the Sixth Circuit, on facts similar to those before us, used a Sixth Amendment analysis to decide that the use of peremptory challenges to exclude blacks from a petit jury was unconstitutional. The State of Michigan petitioned for certiorari and, while the petition was pending, the Supreme Court decided both *Batson* and *Allen*. The Court then vacated the judgment in *Booker* and remanded the case to the Sixth Circuit for reconsideration in light of *Batson* and *Allen*. *Michigan v. Booker*, 106 S.Ct. 3289 (1986).

[2] *continued*
reach the equal protection claim without concerning ourselves with the cause-and-prejudice standard.

As noted, each time Teague has argued a constitutional violation, whether in the state or federal courts, his opponent and the court in question has cited *Swain* as the controlling authority. Two issues may, of course, be so factually and logically related that the raising of one affords the state courts a fair opportunity to consider both. *Williams v. Holbrook*, 691 F.2d 3, 8 (1st Cir. 1982). The majority cannot plausibly conclude that Teague is now making a new or different argument when the other state and federal courts which have heard the matter have determined that *Swain* was dispositive.

On remand, the Sixth Circuit reinstated the *Booker* judgment and opinion, *Booker v. Jabe*, 801 F.2d 871 (6th Cir. 1986); the State of Michigan again petitioned for certiorari but its petition was denied, *Michigan v. Booker*, 107 S.Ct. 910 (1987). This sequence would, of course, strongly suggest that the non-retroactivity of *Batson*, as determined in *Allen*, had no application to *Booker* (and by extension to *Teague*). Since the Sixth Circuit had decided that *Booker* prevailed on Sixth Amendment principles—an issue left undecided in *Batson*—its decision (entirely consistent with the result in *Batson*) was undisturbed either by *Batson* or by *Allen*. I will, therefore, because of *Allen* join battle on the merits on Sixth Amendment terrain. I will not rely directly on *Batson*'s equal protection analysis even though, as shown, Teague did not waive his right to assert an equal protection claim in this court.

I shall, however, take account of *Batson* to this very important (in fact critical) extent: The Supreme Court in *Batson* reweighed the costs of imposing inhibitions upon the exercise of the peremptory challenge and of additional administrative burdens on the courts in order to sustain constitutional values in every criminal jury trial.[3] *Batson*

[3] Thus, *Batson* says:

> The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.
>
> *While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice.* The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges,

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was a policy judgment by the Court that these were costs which could and should be borne. 106 S.Ct. at 1724. If a like policy judgment becomes part of the Sixth Amendment analysis, the results of that analysis become dramatically more favorable to the defendant—even though his rights derive from a different amendment. The reweighing of costs against constitutional demands in *Batson* is a more than adequate response to the claimed inhibitions on the exercise of peremptory challenges and the administrative difficulties that the majority finds to be such decisive considerations. *Batson* completely demolishes the majority's arguments based on policy. In this respect, the majority opinion is little more than a compendium of outmoded views.

II.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the Sixth Amendment guaranteed that the jury pool from which juries are selected must be a representative cross-section of the community. At the time, Louisiana law required that no woman be selected for jury service unless she had previously filed a written declaration of her desire to serve on a jury; in

[3] *continued*

our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those states applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.

Batson, 106 S.Ct. at 1724 (emphasis supplied) (footnotes omitted).

the *Taylor* case itself, there was no woman on the venire from which the jury was drawn. Reviewing earlier cases, the Court said that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. It cited *Smith v. Texas*, 311 U.S. 128, 130 (1940), in which it had held that the exclusion of racial groups from jury service was " 'at war with our basic concepts of a democratic society and a representative government,' " 419 U.S. at 527, and went on to say:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

Id. at 530 (citation omitted).

As the majority correctly points out, this requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community. The majority opinion devotes many pages to establishing this point, though I must confess that I am at a loss to explain why. No one seems to quarrel with this proposition, least of all Teague. Appellant's Brief at 21.

Teague's position, which was adopted by the panel opinion and which even the majority here seems to endorse at one point in its opinion, *supra* p. 12, is that although there is no right to be tried by a representative petit jury, the Sixth Amendment guarantees the possibility that the jury selected will contain a representative cross-section

of the community. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that a six-person jury was constitutionally acceptable; in *Ballew v. Georgia*, 435 U.S. 223 (1978), it held that a five-person jury was not. In each case the Court was guided by the need to draw a line that would preserve the possibility of a representative jury. In *Williams*, the Court indicated that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." 399 U.S. at 100 (emphasis added). In *Ballew*, likewise, the Court expressed concern "about the *ability* of juries truly to represent the community as membership decreases below six," 435 at 242 (emphasis added), and held that "any further reduction . . . that prevents juries from truly representing their communities, attains constitutional significance," *id.* at 239. *See also id.* at 245 (White, J., concurring); *id.* at 246 (Brennan, J., concurring).

Thus, although the Sixth Amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury. It would be odd if the right to a representative jury pool did not reach, in some way or other, into the trial jury, that is, if the Sixth Amendment's reach ended with the first stage of jury selection. If the Sixth Amendment has implications for the jury pool, it can only be because it has some implication for the jury that actually sits at trial. As the Supreme Judicial Court of Massachusetts said in *Commonwealth v. Soares*, 387 N.E.2d 499, 513 (Mass.), *cert. denied*, 444 U.S. 881 (1979):

> It is not enough that there be a representative venire or panel. The desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself.

Thus, it would be nonsensical if the Sixth Amendment's requirement of representativeness in the jury *pool* were not intended to have some sort of effect in the jury *room*.

If the Sixth Amendment does guarantee something about the trial jury, then, it can only be the *possibility* or *chance* that the various groups that make up a community will be represented on the jury, and that is the conclusion that the Supreme Court drew in *Williams*, 399 U.S. 78, and *Ballew*, 435 U.S. 223. The six-person jury is constitutionally acceptable because it is large enough to allow for the possibility that the jury will be representative; the five-person jury is not acceptable because it does not. The majority cites *Ballew* and *Williams* for the proposition that "merely decreasing the possibility of obtaining a fair cross section of the community on the petit jury does not violate the sixth amendment right to a trial by an impartial jury." *Supra* p. 21. The relevant question, however, is whether the possibility is decreased for a constitutionally permissible reason. Excluding jurors on the basis of race is not a constitutionally acceptable reason for reducing the possibility of a representative jury, and the majority makes no attempt to meet this argument. Race-based peremptory challenges obviously impact upon the *process* of jury selection in a way that reduces the statistical probability of a representative jury. *Fields v. Colorado*, 732 P.2d 1145, 1155 (Colo. Sup. Ct. 1987) ("The right to trial by an impartial jury does guarantee that the possibility of a petit jury in a given case representing a fair cross-section of the community will not be limited arbitrarily by the discriminatory and systematic use of peremptory challenges.").[4]

The majority asserts that in this case "the record is barren of any proof or testimony establishing community prejudice towards Teague." *Supra* p. 21. The crucial question, however, is not whether the particular jurors selected were prejudiced against Teague but whether the

[4] In *Fields* the Colorado Supreme Court held that a prosecutor's use of peremptory challenges to systematically exclude Spanish-surnamed veniremen from a jury deprives a defendant of his right to an impartial jury under the Sixth Amendment of the federal Constitution.

prosecution used its peremptory challenges to reduce the possibility that blacks would be sitting on the jury, and there is overwhelming evidence that the state did just that. The prosecution and the defense each had ten peremptory challenges. The state exercised every single one of its challenges to exclude a black venireman.[5] After the state had used six of its peremptory challenges and then again after it had used all ten of its challenges, the defense moved for a mistrial on the ground that the state was using its challenges only against black jurors. In responding to the second motion, the state explained that it had excused some of the veniremen because they were very young and that it had excused others because it was attempting to obtain an equal number of men and women. The state appellate court found the prosecution's explanation unpersuasive, 439 N.E.2d 1066, 1069-70, and after examining the manner in which the state exercised its peremptory challenges, I would agree that the state's proffered explanations were pretextual.[6]

[5] It is true that the defense used one of its challenges to excuse a black; however, the husband of that juror was a policeman and since Teague's trial involved the shooting of a policeman, that decision would seem to be justified on grounds apart from race.

[6] After its first challenge, every juror rejected by the state was a black woman. At that point, at which the only jurors seated were four males, the prosecution had already rejected five black women. It had also accepted three women, ultimately rejected by the defense. It is highly improbable, therefore, that in exercising its first six challenges the state was motivated to exclude women in order to achieve a balance of males and females. Of the next four jurors, all were female; the two whites were accepted by the state and seated; the two blacks were rejected by the state. By the time the tenth juror was seated, seven were male and only three female. Yet the state accepted two males, rejected by the defense, and rejected two black females. The last two women—giving the more or less balanced result of seven men and five women which the state points to in support of its explanation—were added after the state had exhausted its peremptories. In light of this pattern, the state's explanation that it sought to balance men and women is very unpersuasive.

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When members of a certain group can be excluded from service on a particular petit jury, the negative effect upon defendants who happen to belong to that group is not difficult to imagine; and it will be especially severe where the group suffers from community prejudice. In such circumstances, the defendant may not even have the protection of the prosecutor's usual concern to bring only well-supported cases into court, for the prosecutor will know that the defendant's group will not be represented and that he can count to some extent upon the prejudice of the community. The protection provided by the Sixth Amendment lies in the general requirement that the state cannot interfere with the possibility that the jury will be representative. And it is that requirement that explains the need for the jury pool to be actually representative, which would otherwise be a great mystery. And it is that requirement which demands a process of getting from the jury pool to the trial jury which does not affect unjustifiably the statistical probability of any group's being represented.

Further, in a case of this sort the perception is almost as important as the reality. Knowledge that blacks could be excluded at will by prosecutors trying black defendants, for example, would lead to cynicism among blacks in viewing the jury system. The importance of general confidence in the accuracy and reliability of the penal system—confidence that the guilty tend to be convicted and the innocent tend to be acquitted—should not be underestimated; such confidence is crucial to the deterrent effect punishment must have. We do not increase general respect for the law by simply making it easier to get con-

[6] *continued*

The state also claimed to be excluding jurors of "very young years." The state rejected four jurors who were college or business school students, or recent graduates; all were black women. The systematic exclusion of younger jurors is perhaps as pernicious as the exclusion of blacks; but in any case, this rationale cannot by itself explain the state's action.

victions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group. There must be the accompanying perception that the law operates with some precision, tending to convict all those and only those who are guilty. In the extreme case, the law would convict members of a group arbitrarily or at random; and of course in that case punishment would have no effect at all. But if members of a group that suffers from prejudice can be tried before juries from which fellow group members have been excluded, to some extent convictions may be perceived as attributable to prejudice against the group and therefore arbitrary. To the extent that they are so perceived, the purpose of punishment is defeated.[7]

[7] A shocking number of defendants [in Illinois had] alleged [as of 1983] that prosecutors used peremptory challenges to exclude black people from the juries that convicted them:

People v. Payne (1983), 99 Ill. 2d 135, 75 Ill. Dec. 643, 457 N.E.2d 1202; *People v. Yates* (1983), 98 Ill. 2d 502 at 540, 75 Ill. Dec. 188, 456 N.E.2d 1369 (Simon, J., dissenting); *People v. Cobb* (1983), 97 Ill. 2d 465, 74 Ill. Dec. 1, 455 N.E.2d 31; *People v. Williams* (1983), 97 Ill. 2d 252, 73 Ill. Dec. 360, 454 N.E.2d 220; *People v. Bonilla* (1983), 117 Ill. App. 3d 1041, 73 Ill. Dec. 187, 453 N.E.2d 1322; *People v. Gosberry* (1983), 93 Ill. 2d 544, 70 Ill. Dec. 468, 449 N.E.2d 815; *People v. Davis* (1983), 95 Ill. 2d 1, 69 Ill. Dec. 136, 447 N.E.2d 353; *People v. Gilliard* (1983), 112 Ill. App. 3d 799, 68 Ill. Dec. 440, 445 N.E.2d 1293; *People v. Newsome* (1982), 110 Ill. App. 3d 1043, 66 Ill. Dec. 708, 443 N.E.2d 634; *People v. Turner* (1982), 110 Ill. App. 3d 519, 66 Ill. Dec. 211, 442 N.E.2d 637; *People v. Teague* (1982), 108 Ill. App. 3d 891, 64 Ill. Dec. 401, 439 N.E.2d 1066; *People v. Belton* (1982), 105 Ill. App. 3d 10, 60 Ill. Dec. 881, 433 N.E.2d 1119; *People v. Dixon* (1982), 105 Ill. App. 3d 340, 61 Ill. Dec. 216, 434 N.E.2d 369; *People v. Gaines* (1981), 88 Ill. 2d 342, 58 Ill. Dec. 796, 430 N.E.2d 1046; *People v. Mims* (1981), 103 Ill. App. 3d 673, 59 Ill. Dec. 369, 431 N.E.2d 1126; *People v. Lavinder* (1981), 102 Ill. App. 3d 662, 58 Ill. Dec. 301, 430 N.E.2d 243; *People v. Clearlee* (1981), 101 Ill. App. 3d 16, 56 Ill. Dec. 600, 427

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I think it is beyond dispute, therefore, that although the Sixth Amendment does not give the defendant the right to a representative trial jury, it assures him of the possibility that his jury will contain members of the various groups in his community, a possibility that cannot be impaired by the exercise of peremptory challenges based solely on the race of the prospective juror.

[7] *continued*

N.E.2d 1005; *People v. Vaughn* (1981), 100 Ill. App. 3d 1082, 56 Ill. Dec. 508, 427 N.E.2d 840; *People v. Tucker* (1981), 99 Ill. App. 3d 606, 54 Ill. Dec. 646, 425 N.E.2d 511; *People v. Allen* (1981), 96 Ill. App. 3d 871, 52 Ill. Dec. 419, 422 N.E.2d 100; *People v. Bracey* (1981), 93 Ill. App. 3d 864, 49 Ill. Dec. 202, 417 N.E.2d 1029; *People v. Smith* (1980), 91 Ill. App. 3d 523, 47 Ill. Dec. 1, 414 N.E.2d 1117; *People v. Fleming* (1980), 91 Ill. App. 3d 99, 46 Ill. Dec. 217, 413 N.E.2d 1330; *People v. Attaway* (1976), 41 Ill. App. 3d 837, 354 N.E.2d 448; *People v. Thornhill* (1975), 31 Ill. App. 3d 779, 333 N.E.2d 8; *People v. King* (1973), 54 Ill. 2d 291, 296 N.E.2d 731; *People v. Petty* (1972), 3 Ill. App. 3d 951, 279 N.E.2d 509; *People v. Fort* (1971), 133 Ill. App. 2d 473, 273 N.E.2d 439; *People v. Butler* (1970), 46 Ill. 2d 162, 263 N.E.2d 89; *People v. Cross* (1968), 40 Ill. 2d 85, 237 N.E.2d 437; *People v. Dukes* (1960), 19 Ill. 2d 532, 169 N.E.2d 84; *People v. Harris* (1959), 17 Ill. 2d 446, 161 N.E.2d 809.

People v. Payne, 99 Ill. 2d 135, 152-53, 457 N.E.2d 1202, 1210-11 (1983) (Simon, J., dissenting).

> [I]t is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all blacks, or all but token blacks, from juries in criminal cases where the defendants are blacks.

People v. Gilliard, 112 Ill. App. 3d 799, 807, 445 N.E.2d 1293, 1299 (1983) (footnote omitted), *rev'd*, 96 Ill. 2d 544, 454 N.E.2d 330 (1983).

This problem is not unique to Illinois. After the Supreme Court decided *Griffith v. Kentucky*, 107 S.Ct. 708 (1987), which held that *Batson* would be applied retroactively to cases pending on direct state or federal review when *Batson* was decided, the Court granted certiorari in 24 cases from various jurisdictions in which a *Batson* claim was raised, vacated the judgment in each case and remanded for reconsideration in light of *Griffith*.

The majority does not really address why it believes that the exercise of peremptory challenges solely on the basis of a juror's race does not violate the Sixth Amendment. Instead, it seems to rest its opinion on the practical problems involved in restricting the exercise of peremptory challenges. I do not disagree that the peremptory challenge is itself an important guarantor of an impartial jury. The peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate or for reasons that do not reach the level of cause, of being partial to the other side. Where challenges are used in that way, the resulting jury should be closer to the ideal of a body without sympathies for either side. Since the selection of juries from the master roll is more or less random, the problem of one-sided sympathies in a group drawn for service on a particular day is not far-fetched. Hence, the peremptory challenge has an important function, along with the challenge for cause, in our rough-and-ready system for arriving at impartiality. The problem I find with the majority opinion is that the Supreme Court in *Batson* has already rejected the argument that the exercise of peremptory challenges cannot be policed without destroying the effectiveness of the challenges. The majority is thus pursuing a contention that is unrelated to any particular constitutional doctrine and which has been thoroughly discredited by the Supreme Court in *Batson*.

I agree with the majority that the problems of maintaining the effectiveness of the peremptory challenge and of relieving the administrative burden on courts are the considerations which led the Court for many years to cling to *Swain*. The Court has now decided, however, that the effectiveness and credibility of the criminal justice system is at stake and these problems which traditionally aroused concern must simply be accepted and solved. This momentous policy decision by the Supreme Court opens the way just as much to reconsideration of the issues under the Sixth Amendment as under the equal protection clause. The "practical" arguments of the majority have already

been answered by the highest judicial authority, and I should think they would be considered anachronisms rather than a source of guidance to this court in the post-*Batson* era.

For the foregoing reasons, I respectfully dissent.

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. FRANK DEAN TEAGUE, Petitioner,	)	
v.	)	No. 84 C 1934
MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center, Respondents.	)	

O R D E R

Petitioner Frank Dean Teague seeks habeas corpus relief from his present incarceration at the Stateville Correctional Center, arguing that his conviction by an all white jury in the Circuit Court of Cook County, Illinois violated the Sixth and Fourteenth Amendments because the prosecution used all ten of its peremptory challenges to exclude prospective black jurors. Teague does not allege that the Cook County State's Attorney systematically excludes prospective black jurors from all criminal cases involving black defendants. Relying upon Swain v. Alabama, 380 U.S. 202 (1965) (use of peremptory challenges to exclude blacks from service in an individual case is not a denial of equal protection absent systematic exclusion), the respondent has moved for summary judgment.

Teague maintains that the Supreme Court has invited a reevaluation of Swain. See McCray v. New York, ___ U.S. ___, 103 S. Ct. 2438 (1983) (Stevens, Blackmun and Powell, J.J., concurring). In light of holdings of the Supreme Courts of

Massachusetts and California that the use of peremptory challenges to exclude prospective black jurors violates their state constitutional guarantees of an impartial jury, see Commonwealth v. Soares, 377 Mass. 593, 387 N.E.2d 499, cert. denied, 444 U.S. 981 (1979) and People v. Wheeler, 222 Cal.3d 258, 583 F.2d 748 (1978), Teague asks this Court to view Swain as noncontrolling.

Teague argues persuasively, and were this Court writing on a clean slate, it might be inclined to adopt the reasoning he advances. However, the issue is foreclosed by Swain and the Seventh Circuit's recent decisions in United States v. Clark, No. 82-1813 (7th Cir. June 20, 1984) and United States ex rel. Palmer v. DeRobertis, No. 83-1148 (7th Cir. May 14, 1984). This Court is not free to reject the holding of the Court in Clark, as petitioner requests. Since this Court sits "on the shores of Lake Michigan rather than the banks of the Potomac," Vail v. Board of Education of Paris Union, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring), the decisions in Clark and Palmer are controlling.

IT IS THEREFORE ORDERED that respondents' motion for summary judgment is granted. The petition for a writ of habeas corpus is denied.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: August 8, 1984